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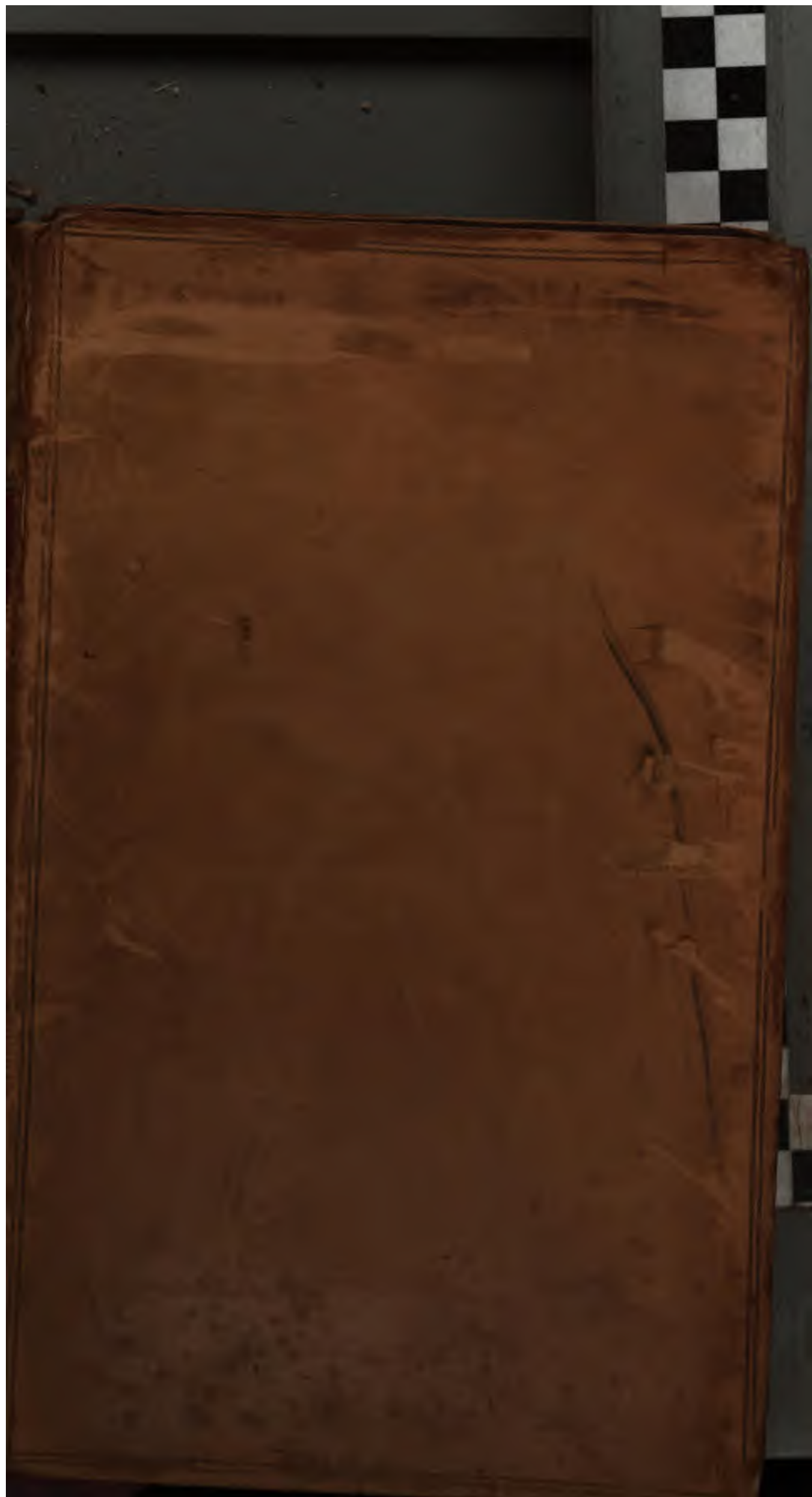
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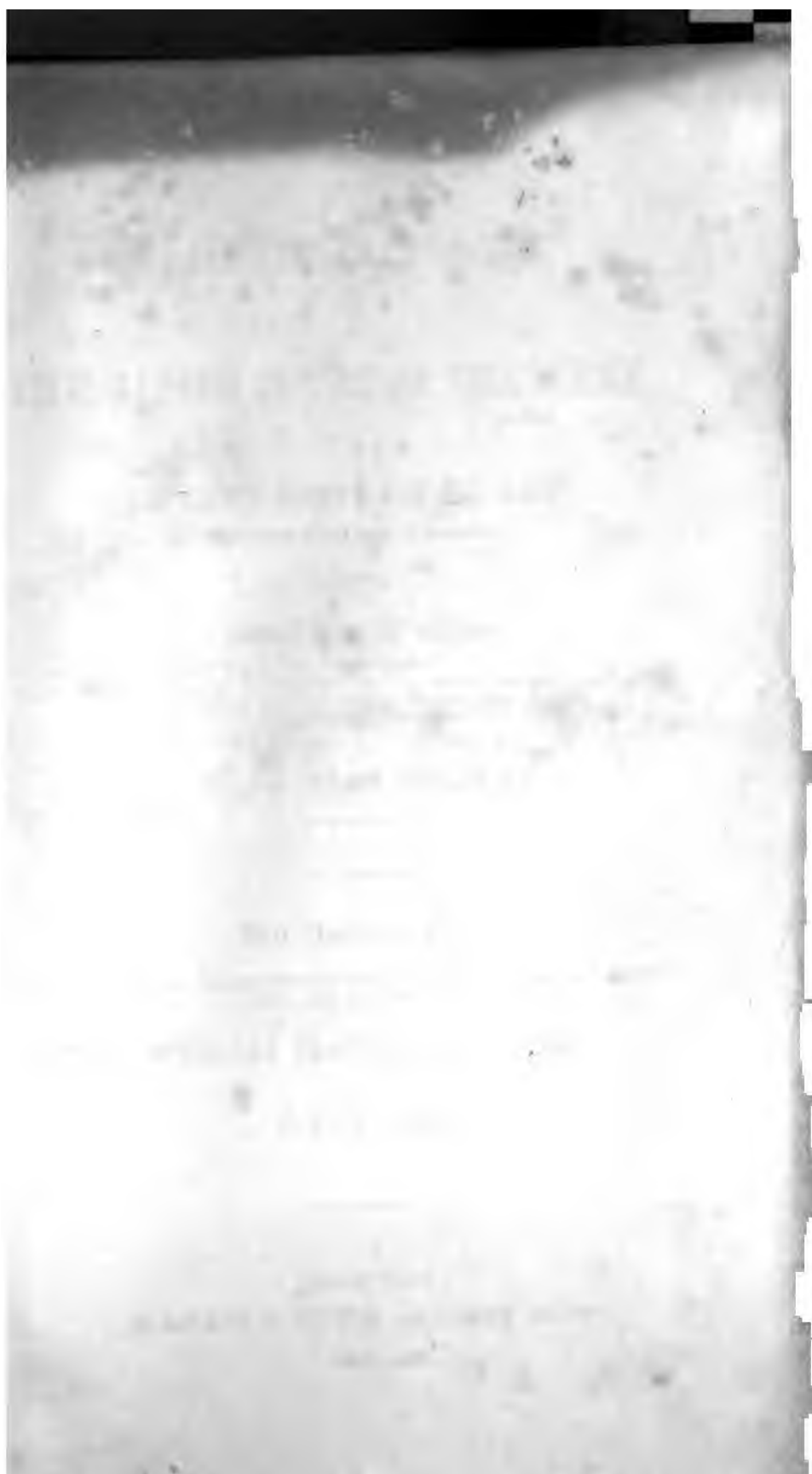
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**PLEADING AND PRACTICE**  
OF  
**THE HIGH COURT OF CHANCERY,**

BY  
**EDMUND ROBERT DANIELL, F.R.S.**

A COMMISSIONER OF THE COURT OF BANKRUPTCY.

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TO WHICH ARE ADDED SEVERAL ENTIRELY NEW CHAPTERS, AND COPIOUS  
NOTES, ADAPTING THE WORK TO

**AMERICAN PRACTICE IN CHANCERY,**

BY  
**J. C. PERKINS.**

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**BOSTON:**  
**CHARLES C. LITTLE AND JAMES BROWN.**

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## CHAPTER XXVII.

## OF COSTS.

SECTION I. — *Of Costs in General.*

As it is the usual practice of the Court, where, upon the hearing, it directs either an issue or a case or a reference to a Master, not to give any directions upon the subject of costs till after the verdict or certificate of the Judges has come in, or till the Master has made his report, (a practice which appears to have been adopted for the purpose of accelerating the final termination of the suit (a),) it generally happens that the costs of the suit are taken into consideration at the time when the cause comes on for hearing for further directions, and that on such occasions, as soon as the further directions are disposed of, the Court makes such order with regard to the costs as it thinks the justice of the case requires. In this respect the Court of Chancery, to a certain extent, acts upon the rule adopted by Courts of Law, that *unica directio fiat damnorum*, and which, therefore, give no costs, except upon interlocutory applications, until the final judgment. Courts of Equity, however, do not, in all cases, consider themselves bound by this rule, and they frequently give costs in intermediate stages of the cause, without waiting for the final decree. In fact the giving of costs in equity is entirely discretionary (b) (1); as well with respect to the period at which the Court decides upon them, as with respect to the parties to whom they are given; but as it is usually upon the hearing for further directions that the question of costs is decided, the present appears to be the proper stage of this Treatise for directing the practitioner's attention to the principles upon which the Courts act in their decisions upon them.

Costs not usually given till further directions.

Difference between Courts of Law and of Equity.

Costs in equity discretionary.

(a) Vide *Scarborough v. Burton*, 2 Atk. 111.

(b) *Ibid.*; *Bennett v. College*, 3 Bro. C. C. 390.

(1) And not the subject of error. *Cowles v. Whitman*, 10 Conn. 121.

Different sorts  
of Costs.

Meaning of  
the term *dis-*  
*cretionary*.

Costs given  
out of the  
fund.

When it is said that the giving of costs in Courts of Equity is entirely discretionary, it must not be supposed that these Courts are not governed by definite principles in their decisions relative to the costs of proceedings before them; all that is meant by the *dictum* is, that these Courts are not, like the ordinary Courts, held inflexibly to the rule of giving the costs of the suit to the successful party, but that they will, in awarding costs, take into their consideration the circumstances of the particular case before it, or the situation or conduct of the parties, and exercise their discretion with reference to those points. In exercising this discretion, however, Courts of Equity are generally governed by certain fixed principles which they have adopted upon the subject of costs, and do not, as is frequently supposed, act upon the mere caprice of the Judge before whom the cause happens to be tried (1).

Another difference between the Courts of Law and Courts of Equity with respect to costs, frequently arises from the nature of the property over which Courts of Equity are called upon to exercise their jurisdiction. A large proportion of suits in Equity are instituted for the purpose of obtaining the administration of the property of deceased persons, and in cases of that description,

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(1) *Brooks v. Byam*, 2 Story C. C. 553, 554.

Costs do not always follow a decree in favor of a party, but rest in the discretion of the Court, and are to be awarded or refused, according to the justice of each particular case. *Kaye v. Bank of Louisville*, 9 Dana, 261, 264; *Toulinson v. Ward*, 2 Conn. 396; *Hunt v. Lewin*, 4 Stew. & Port. 138; *Randolph v. Rosser*, 7 Porter, 249. But see *Hightower v. Smith*, 5 J. J. Marsh. 542, 544; *Burgh v. Kenny*, 1 Irish Eq. 264. Costs do not always follow a decree in favor of the party praying relief. *Travis v. Waters*, 12 John. 500; *Method. Epis. Church v. Jaques*, 1 John. Ch. 65; *ib.* 166; *Cowles v. Whitman*, 10 Conn. 121; *Coleman v. Moore*, 3 Litt. 355; *Tomlinson v. Ward*, 2 Conn. 396. And where both parties are equally innocent, and endeavoring to avoid a loss caused by a third person, no costs will be awarded to either party against the other. *Pendleton v. Eaton*, 3 John. Ch. 69. So in a case of great novelty, or where the practice on the subject was unsettled, the Court will not give costs to either party. *Jones v. Mason*, 5 Rand. 577; *Hoffman v. Skinner*, 5 Paige, 526.

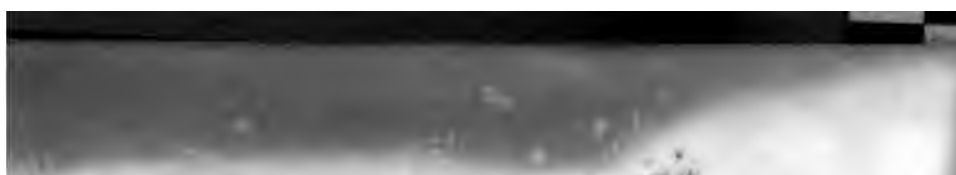
Nor where both parties have claimed what they are not entitled to, and each has succeeded as to part of the matters in litigation between them. *Crippen v. Hermance*, 9 Paige, 211.

If it should appear that both parties are in fault, the Court will not give costs to either. *Clark v. Reed*, 11 Pick. 446, 449; *Saunders v. Frost*, 5 Pick. 259, 274.

When the parties stand equally fair in every respect, the party who brings the other into Court ought to pay the expense. *Catlin v. Harned*, 3 John. Ch. 61.

In proceedings in the nature of amicable suits, costs are not decreed. *M'Connell v. M'Connell*, 11 Vermont, 290.

Inasmuch as costs in Chancery do not necessarily follow a decree, there must not only be a decree in favor of a party, but there must also be an express order or decree for his costs, or they are lost. *Connable v. Bucklin*, 2 Aik. 221. See *Travis v. Waters*, 12 John. 500; *S. C.* 1 John. Ch. 85.





**Different Sorts  
of Costs.**

**Rule with re-  
gard to costs  
of motions.**

**Where suc-  
cessful.**

**Where they  
fail.**

**Where unop-  
posed.**

**In what cases  
the subject of  
special direc-  
tions.**

being or not being "costs in the cause," and that those costs which do not come within the definition of costs in the cause, under these rules, cannot be obtained as such without the special direction of the Court. What costs of interlocutory applications by motion, are to be considered as "costs in the cause," may be collected from the following rules laid down by Sir John Leach, V. C. in 1823 (*d*). These rules, which were the result of certain questions proposed to the Registrar (Mr. Walker), for the purpose of ascertaining in what cases the costs of a motion, where the Court gives no direction as to such costs, became "costs in the cause," to a party whose costs of suit are given upon the hearing, and are as follows:—

1st. That the party making a successful motion is entitled to his costs as "costs in the cause," but the party opposing it is not entitled to his costs as "costs in the cause" (*e*) (1).

2nd. That the party making a motion which fails is not entitled to his costs as "costs in the cause," but the party opposing it is entitled to his costs as "costs in the cause" (*f*) (2).

3rd. That where a motion is made by one party and not opposed by the other, the costs of both parties are "costs in the cause" (*g*).

To these rules the Vice-Chancellor added, that it was, therefore, the duty of the Court, whenever, by reason of special circumstances, it was not the intention of the Court that these rules should apply, to give particular directions with respect to the costs; but that the Court very rarely gave any special directions with respect to the costs of a motion for the purpose of obtaining, continuing, or dissolving an injunction to stay proceedings at Law, leaving the costs of such motions to abide the event of the suit. An instance of the Court's departure from the ordinary rule occurred before the same learned Judge in *Marsack v. Reeves* (*h*).

(*d*) Memorandum, 1 S. & S. 357.

(*e*) *Ibid.* If the object of the motion be in the nature of an indulgence to the party applying, he will pay the costs, although the motion is granted.

—[*Browne v. Lockhart*, 10 Sim. 420.]

(*f*) *Ib.*; vide etiam, *White v. Lisle*,

4 Mad. 226. The rule applies to motions to obtain or to dissolve an injunction. *Marsack v. Reeves*, Mad. & Geld. 108.

(*g*) 1 S. & S. 357.

(*h*) *Ubi supra*.

(1) *Stafford v. Bryan*, 2 Paige, 45; Halst. Dig. 176.

(2) *Stafford v. Bryan*, 2 Paige, 45.

Where a party successfully opposes a motion and nothing is said about costs, in the order denying the application, he is entitled to his costs of opposing, as costs in the cause, if he obtains a decree for costs. *Rogers v. Rogers*, 2 Paige, 299. See *Wilkinson v. Henshaw*, 4 Paige, 257.

In that case the object of the suit was to have a bond delivered up on payment of the principal money and interest, and an injunction to restrain proceedings at Law, and an *ex parte* injunction was obtained upon the plaintiff's paying the principal money and interest into Court. The defendant afterwards moved to dissolve the injunction, but failed, and although, according to the ordinary rule of the Court, as above laid down, the costs of the plaintiff in resisting the motion to dissolve the injunction would have been "costs in the cause," yet, as the habit of the Court is to consider suits of the nature of the one in question as suits to redeem, in which the costs are to be paid by the plaintiff, (the consequence of which, if no order were made as to costs, would be that the plaintiff would be deprived of his costs of the motion,) his Honor directed the motion to be dismissed *with costs*.

Costs in the Cause.  
before interlocutory application.

It may be convenient to mention here, that the 123rd Order of May, 1845, has directed that, "Upon interlocutory applications where the Court deems it proper to award costs to either party, the Court may, by the order, direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid."

Power in the Court to direct gross sum to be paid for costs.

The costs of an abandoned motion are not costs in the cause, — where and therefore, where a party gave notice of a motion and died before the motion was heard, and the suit was revived by his executors who declined to proceed with the motion, — upon the bill being afterwards dismissed with costs, the Master, in taxing the costs, disallowed the defendants the costs of the abandoned motion; whereupon they made an application to the Court, for liberty to except to the Master's certificate, and Sir C. C. Pepys, M. R., being of opinion that the case was unprovided for by Lord Eldon's Order of the 5th of August, 1818 (*i*), directed a reference to the Six Clerks to ascertain whether, previously to that Order, the costs of an abandoned motion were considered as costs in the cause, and, upon those officers certifying their opinion that they were not, the application was dismissed with costs (*k*).

— where motion has been abandoned.

It may be mentioned here, that, upon the question of costs, a defendant in Equity has the advantage of appealing to his own answer, and that, although such answer cannot be read as evidence on his own behalf, upon the matter in dispute between him and the plaintiff, the Court will, before it decides upon the question of

Defendant may read his own answer upon questions of costs;

(i) 1 Swanst. 128.

(k) Lewis v. Armstrong, 3 M. & K. 69.

Answer read  
upon Questions  
of Costs.



but not to  
show a tender.

costs, look into the answer, and act upon the representations it contains (*l*), and it will frequently, although compelled, by the evidence read in the cause, to decree against a defendant, give credit to his own statement, contained in his answer upon oath, as to his conduct, and make the decree against him without costs (*m*). The same practice also extends to the answers of peers (*n*), although they are put in upon honor only and not upon oath (*o*).

The rule above laid down will not, however, apply to cases in which a tender of the amount due is relied upon by the defendant. The mere statement of a tender in the answer is not sufficient to save costs, it must be proved (*p*).

## SECTION II.

### Of Costs from one Party to another.

General rule.

Costs follow  
the result.

Except under  
particular cir-  
cumstances.

It was the rule of the Civil Law, that *victus victori in expensis condemnatus est* (*q*), and this is the general rule adopted in the Court of Chancery, as well as in Courts of Law, at least to the extent of throwing it upon the failing party to show the existence of circumstances to displace the *prima facie* claim to costs given by success to the party who prevails (*r*) (1).

If, however, the failing party can show to the Court any circum-

- |   |   |
|---|---|
| <p>(<i>l</i>) Vancouver v. Bliss, 11 Ves. 374; sed vide Beames on Costs, 69.<br/>458; Howell v. George, 1 Mad. 1.<br/>(<i>m</i>) Vide Millington v. Fox, 3 M. &amp; C. 338.<br/>(<i>n</i>) Dawson v. Ellis, 1 J. &amp; W. 524.<br/>(<i>o</i>) Ante, p. 845.<br/>(<i>p</i>) Milnes v. Davidson, 3 Mad.</p> | <p>(<i>q</i>) Cod. note (<i>r</i>), 3, 1, 13.<br/>(<i>r</i>) Vancouver v. Bliss, 11 Ves. 463; Staines v. Morris, 1 V. &amp; B. 8, 15; Millington v. Fox, 3 M. &amp; C. 338, 358; Colburn v. Sim, 2 Hare, 543.</p> |
|---|---|

(1) As a general rule, the prevailing party is *prima facie* entitled to costs as well in a Court of Equity as at Law. Saunders v. Frost, 5 Pick. 260, 271; Clark v. Reed, 11 Pick. 446, 449; Bryant v. Russell, 23 Pick. 508.

And when a creditor recovers a debt in the Court of Chancery, he recovers costs also, unless special and strong reasons to the contrary intervene. And those costs, in general, are the costs of the whole litigation; although the creditor may have failed as to part of his demand. Hunn v. Norton, 1 Hopk. 344; Woodson v. Palmer, 1 Bailey Eq. 95; Ward v. Davidson, 2 J. J. Marsh. 443; Shackelford v. Helm, 1 Dana, 338; Bradford v. Allen, Hardin, 1.

It is the practice where some of several issues are found for the plaintiff and others for the defendant, to allow costs to the party in whose favor final judgment is given. Thomas v. Fred. Co. School, 9 Gill & John. 115.

But a party entitled to the general costs of a suit will be ordered to pay such of the costs as have been incurred by his litigating groundless claims. Dupont v. Johnson, 1 Bailey Eq. 279.

*From one Party to another.*

stances which may satisfy it that it would be against the ordinary principles of justice that he should pay the costs of the proceeding, he will be permitted to do so; and the Court will even, under certain circumstances, not only excuse the unsuccessful party from the payment of costs to his opponent, but will actually throw his costs upon the party succeeding. Cases of the latter kind, however, are very limited (1).

In what  
Costs  
follow  
Res

It is to be observed, that the general rule which gives the costs of the suit to the victorious party, and throws them upon the unsuccessful party, applies equally to cases in which the parties are suing or defending in *autre droit*, and to those in which they are *sui juris*. Therefore executors, administrators, or trustees, instituting or defending suits against strangers to their trusts in those capacities, are subject to the same rules, as to costs, as they would be if they were suing or defending in their own rights. Thus an executor or administrator instituting a suit against a debtor to his testator's or intestate's estate, as he will, if he succeeds, be entitled, under the general rule, to the costs of his suit from the debtor, so, if he fails, must he pay the costs of his adversary (s). In like manner a trustee for sale, filing a bill against a purchaser for a specific performance of his agreement, is liable to pay or receive costs from his adversary, in the same manner as a person instituting or defending such a suit in his own right (t). The question whether a party who sues or defends in *autre droit*, and is unsuccessful, shall be reimbursed his costs out of the estate which he represents, or in respect of which he is a trustee, is a totally distinct one, and will partly be discussed hereafter, when we come to treat of cases in which costs are payable out of the fund which is the subject of litigation (u).

Trustee  
sonal re  
sentativ  
subject  
general

There are, however, certain cases, arising from the character sustained by the party, in which the Court generally gives the

In the ca  
an heir

(s) Vide *Westley v. Williamson*, 2 Moll. 458.

(t) *Edwards v. Harvey*, Coop. 39.  
(u) Vide post, § 3.

(1) Where the main question in a bill is decided against the plaintiff, though he succeed in obtaining a decree, the defendant is entitled to his costs up to the time of the decision of the main question. *M'Connell v. M'Connell*, 11 Vermont, 290.

Costs are properly adjudged in favor of a party who has good cause to sue at the time he does sue, up to the filing of the answer, though such party is ultimately unsuccessful from the lapse of time before filing answer and the happening of other facts not then existing. *Philips v. Barbareaux*, 2 B. Monroe, 89, 91; *Martin v. White*, 1 Bibb, 584. See *Demarest v. Wynkoop*, 3 John. Ch. 147; *Williams v. Matlocks*, 3 Vermont, 189.

In what Cases  
Costs do not  
follow the  
Result.



costs to that party, whatever may be the result of the suit. One of these cases is where an heir at law is made a party to a suit for the purpose of establishing a claim against real estate. In these cases it is the almost invariable rule of the Court to give the heir at law his costs of the proceeding. In this respect the heir is more favored than executors. "Executors," says Lord Hardwicke, "shall not have costs, because they may renounce, but it is the Law, which cast the descent upon the heir, and that differs his case from the executor's: and if he has accounted, justly, for such money as is come to his hand, it certainly entitles him to his costs (x).

— defendant  
to a suit to es-  
tablish a will,  
— in a char-  
ity suit,

— although  
no resulting  
trust,

When the heir  
at law is not  
allowed his  
costs.

Heir at law  
entitled to  
costs of an  
issue.

So, where an heir at law is made party to a suit for the purpose of proving a will against him, he will be entitled to his costs (y), and he will not forfeit this right by cross-examining the plaintiff's witnesses (z). So, also, where an heir at law is brought before the Court in the case of a charity, he will be entitled to his costs; and, in general, if he makes no improper point, he will be awarded them as between solicitor and client (a). And in a charity case where an heir at law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client, although the Court was, upon the hearing, of opinion that there was no resulting trust in his favor (b).

This rule, that an heir at law is entitled to his costs, is not, however, without exceptions. Thus where an heir set up a claim to property as undisposed of under the will and failed, he was refused his costs (c); and, where the bill is merely one to perpetuate the testimony of the witnesses to the will, if the heir examines witnesses of his own in chief he will not be allowed his costs of so doing (d); but this is only where the bill does not pray relief, or is not one of a nature to be brought to a hearing. Where the cause is one which may be brought to a hearing, more latitude is allowed (e); if he chooses to examine witnesses himself, the question of costs will depend upon the circumstances; but he is indulged in going a step further.—On account of the frail and imperfect mode of examining into *facts* in this Court, he has a right, *ex debito justitiæ* (f), to demand an

(x) *Humphry v. Morse*, 2 Atk. 408.

(y) *Crew v. Joliff*, Prec. in Ch. 93;

*Luxton v. Stephen*, 3 P. Wms. 373.

(z) *Boyer v. Boyer*, 1 Dick. 300.

(a) *Currie v. Pye*, 17 Ves. 462.

(b) *Attorney-general v. The Haberdashers' Company*, 4 Bro. C. C. 178.

(c) *Rashley v. Masters*, 1 Ves. J.

205.

(d) *Berney v. Eyre*, 3 Atk. 387;

*Vaughan v. Fitzgerald*, 1 Sch. & Lef.

316.

(e) *Berney v. Eyre*, ubi supra.

(f) *White v. Wilson*, 13 Ves. 87.

issue, to the costs of which, even though the verdict be against him, and the will is established (*g*), he will, unless there are any peculiar circumstances in the case which may induce the Court to refuse them, be considered entitled (*h*). Thus where one of the witnesses did not clearly prove the execution of the will, and the heir asked for an issue, on the trial of which the will was found duly executed, upon the case coming on for further directions the heir asked for his costs both in Law and in Equity, and they were given him by the Court (*i*).

In what Cases  
Costs do not  
follow the  
Result.

Amongst the peculiar circumstances which will induce the Court to refuse costs to an heir, may be mentioned his attempting to set up insanity or any other disability against the person who made the will (*k*). And, in a recent case, a defendant, brought before the Court as heir, was deprived of his costs, both at Law and in Equity, because he had thought proper to state in his answer to the original bill, that he was heir at law to the testator, and to dispute the will, although he knew, as he admitted in his answer to the supplemental bill, that his elder brother had left children (*l*).

Heir deprived  
of his costs  
where he sets  
up insanity  
and fails;  
or admits that  
he is heir at  
law when he  
is not,

Where, also, an heir at law unnecessarily filed a cross bill for the purpose of establishing his claim to certain legacies to charities which the testator had charged upon real estates, the whole benefit of which he might have had under the original bill, Lord Thurlow gave the costs of the cross bill out of the real estate, which, in effect, fixed them upon the heir (*n*).

but not  
when he  
proves against  
the estate as  
creditor.

But, although where an heir is brought before the Court as a defendant, he may, under the circumstances suggested, be deprived of his costs, yet this Court will not give costs against him, even though he should insist upon the will's being fraudulent, or the testator being insane, and an issue is directed at Law to try the fraud or insanity, and he fails in the attempt of overturning the will (*o*). It must be a very strong case which will induce the Court to give costs against the heir, such as spoliation or secreting the will (*p*), or where he vexatiously contests the will by set-

Where an heir  
at law unnec-  
essarily files a  
cross bill.

In what cases  
costs given  
against heir.

(*g*) *Ibid.*; *Berney v. Eyre*, 3 Atk. 387; *Webb v. Claverden*, 2 Atk. 424; and vide *Tuthill v. Scott*, 2 Moll. 468; *Tucker v. Sanger*, 1 M'Lel. & Y. 425; 13 Pri. 609, S. C.  
(*h*) For the practice with regard to the costs of issues to try the validity of wills, vide ante, p. 1317.  
(*i*) *Wright v. Wright*, 5 Sim. 449.  
(*k*) *Berney v. Eyre*, 3 Atk. 387; ante, p. 1317.  
(*l*) *Roberts v. Soones*, 7 Sim. 418. and see *Burne v. Breen*, 1 B. & B. 308.  
(*n*) *Leacroft v. Maynard*, 3 Bro. C. C. 233; and vide *Beames on Costs*, 63.  
(*o*) *Webb v. Claverden*, 2 Atk. 424; *Smith v. Dearmar*, 3 Y. & J. 278.  
(*p*) *Berney v. Eyre*, 3 Atk. 387.

In what Cases Costs do not follow the Result. ting up a case of insanity, knowing the devisor to be perfectly sane (*q*).

— where he files a bill to impeach will,

even though he be an infant.

*Socus*, where he could not have proceeded at law.

Where bill is filed against rector or vicar to establish a *modus*.

It is to be remarked, however, that it is, in general, in those cases only in which the heir at law comes before the Court as a defendant, that he is considered as entitled to his costs as a matter of course, where he assumes the character of a plaintiff, and seeks to impeach a will on the ground of insanity, or upon any other ground upon which he might impeach it by ejectment at Law, he will, if unsuccessful, be ordered to pay the costs (*r*), and this even though he be an infant; “because he may, notwithstanding, bring a bill on coming of age, or ejectment; indeed it is not certain whether another *prochein amy* may not bring a bill” (*s*).

It is only, however, in cases in which the heir might have proceeded at Law that he will be liable to costs if his bill be dismissed; where that is not the case, he will not be compelled to pay the costs: the Court, in fact, considers that an heir at law, contending for his inheritance upon fair grounds, shall not pay the costs, though he do not succeed in establishing his right; and therefore, where the testator, previously to making his will, conveyed his estate to a trustee, upon trust to convey it as he, the testator, should direct by his will, and the heir filed a bill to impeach the will, which was dismissed, Sir J. Leach, M. R., determined that, as the circumstance of the trust rendered it necessary for the heir to come into equity, the dismissal should be without costs, although he ordered the heir to pay the costs of an issue which had been directed, and in which he had failed (*t*).

From analogy to the case of an heir at law, brought before the Court for the purpose of having a will of his ancestor established against him, Courts of Equity appear to have adopted the rule that where a bill is filed by an occupier or owner against a vicar or rector to establish a *modus*, the vicar or rector shall have the costs of the proceeding, unless he disputes the *modus*; therefore, where a bill was brought against a rector to establish a *modus*, and he, by his answer, submitted to it, the Court established the *modus*, and

(*q*) *White v. Wilson*, ubi supra; ante, p. 1318.

(*r*) *Webb v. Claverden*, ubi supra; *Seal v. Brownton*, 3 Bro. C. C. 214; *Johnston v. Gardiner*, 1 Dick. 313.

(*s*) *Blinkehorne v. Feast*, 1 Dick. 153; 2 Ves. 27, S. C.

(*t*) *Scaif v. Scaif*, 4 Russ. 309; vide etiam, *Tatham v. Wright*, 2 R. & M. 1-32. It seems, from some early cases, to have been the doctrine of the

Court, that an heir at law, or heir male of the honor of a family, has a right to come into equity for a production and inspection of the deeds by which he is disinherited, and that, if he does so, he will not be liable to costs; vide *Leman v. Alie*, Amb. 163; *Harrison v. Southcote*, 2 Ves. 496; 1 Atk. 539; *Earl Suffolk v. Howard*, 2 P. Wms. 176; *Shales v. Barrington*, 1 P. Wms. 481.

ordered the plaintiff to pay the rector his costs of suit, notwithstanding such suit might have been considered as having been, in some measure, rendered necessary, by the rector having previously filed his bill for tithes, which had been dismissed with costs (u); and so where a bill was filed against a vicar, who declined an issue to try the *modus*, the decree established the *modus* and directed the plaintiff to pay the vicar his costs (x). It seems, however, that, in cases of this description, if the rector or vicar dispute the *modus*, and it is established against him, he will not be entitled to his costs, though costs will not be awarded against him (y), unless he prays an issue, in which case he will be ordered to pay the costs at law, but not those in equity (z). Where, in a case of this description, several issues are directed, some of which were found for the plaintiff and others for the defendant, each party was allowed the costs of the issues found in his favor (a).

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Result.

Secus where he  
disputes the  
modus.

Another case in which the Court generally gives costs to the party, without reference to his success in the suit, is that of a mortgagee or other incumbrancer having a specific lien upon property; the principle of the Court being, that where the owner comes to deliver the estate from the incumbrance which he himself, or those under whom he claims, had put upon it, the person having that pledge is not to be put to expense with regard to that proceeding, and so long as he acts reasonably as mortgagee, to that extent he ought to be indemnified (c).

In the case of  
mortgagees or  
other incum-  
brancers;

This principle has been applied, also, to those cases in which, although the transaction between the parties did not originally consist in borrowing or lending money, or charging an estate with a particular sum, the Court has thought proper to consider a party advancing money in the light of a mortgagee or incumbrancer. The cases to which I allude are those in which it orders securities to be delivered up or sales of reversionary interests to be set aside, because the bargain has been unconscientious; in these cases the Court generally decrees for the plaintiff, upon terms, that he shall repay the defendant the amount actually advanced or paid by him, with interest; and looking upon him as a mortgagee for that

In the case of  
persons stand-  
ing in the char-  
acter of in-  
cumbrancers,  
because bar-  
gain has been  
unconscien-  
tious.

Costs allowed  
although bar-  
gain has been  
unconscien-  
tious.

- (u) *Berners v. Hillet*, 3 Gwil. 1840, p. 46, cases there cited.  
871.  
(x) *Leman v. Alie*, ubi supra. (a) *Prevost v. Bennett*, 2 Pri. 272;  
(y) *Cleaves v. Knyfton*, 3 Gwil. 100. and see *Brookland v. Golding*, Wight.  
1048. (c) *Detillin v. Gale*, 7 Ves. 584;  
(z) *Clifton v. Orchard*, 1 Atk. 610. *Loftus v. Swift*, 2 Sch. & Lef. 642;  
Vide etiam, *Cleaves v. Knyfton*, ubi *Taylor v. Baker*, Dan. Ex. Rep. 71.  
supra; and *Beames on Costs*, ed.



In what Cases Costs do not follow the Result. amount, it further treats him as such, by ordering the plaintiff to pay him his costs (*d*).

Upon this principle, where an apothecary gave his patient 50 guineas to receive 500, or an annuity of 100 if he should survive a year, which he did; upon a bill, brought by the apothecary against the executors, Lord Thurlow dismissed the bill; but as, upon a bill to set aside the agreement, the apothecary must have received back his money, he dismissed it without costs (*e*).

Rule that mortgagee, &c. is entitled to his costs, It is to be observed, that, at Law, after a mortgage is forfeited, the estate is the absolute property of the mortgagee, and he may deal with it as his own; he may sell it, or incumber it, or devise it; if, therefore the mortgagor applies to a Court of Equity for redemption, it is only granted to him upon the terms of indemnifying the mortgagee from all costs arising out of his legal acts; therefore, a mortgagor filing a bill to redeem must pay the costs not only of the mortgagee himself but of all persons claiming under him (*f*) (1).

— extends to those of all persons claiming under him,

— applied in suits to foreclose as well as in redemption suits,

A mortgagee allowed all costs incurred by him in defending his title.

The same rule applies to a foreclosure, as well as a redemption (*g*), and it is to be remarked that, upon the question of a mortgagee's costs, it in general makes no difference whether the bill is filed by the mortgagor to redeem or by the mortgagee to foreclose; in either case the mortgagee is entitled to his principal, interest, and costs (2). Thus where a mortgagee assigned his mortgage money to the trustee of his settlement, and afterwards filed a bill of foreclosure against the mortgagor, to which the trustee was made a party, he was ordered to pay the costs of the trustee and to add them to the mortgage debt (*h*).

A mortgagee, it is to be remarked, will not only be allowed his own costs, and the costs of those claiming under him, but he

(*d*) *Peacock v. Evans*, 16 Ves. 512; (*f*) *Wetherell v. Collins*, 3 Mad. 255.  
*Gowland v. De Faria*, 17 Ves. 20; (*g*) *Bartle v. Wilkin*, 8 Sim. 238.  
*Bowes v. Heaps*, 3 V. & B. 117. (*h*) *Ibid*.  
(*e*) *Priestley v. Wilkinson*, 1 Ves. J. 214.

(1) Where a party files his bill to redeem, the general rule is, that he must pay costs to the mortgagee, although he should be successful. *Slee v. Manhattan Co.* 1 Paige, 48; *Vroom v. Ditmas*, 4 Paige, 527.

In *Saunders v. Frost*, 5 Pick. 272, the Court say that the rule, that the mortgagee is under no circumstances chargeable with costs, is not only unreasonable, but is opposed to the Statute of Massachusetts, 1798, ch. 77, which expressly authorizes the Court "at their discretion to award costs to either party, as Equity may require."

In the above case of *Saunders v. Frost*, upon a bill to redeem, the defendant interposed objections, some of which were groundless and unreasonable, and he failed in his defence, but the plaintiff was also in fault, and the Court refused to allow costs to either party. See *Turner v. Turner*, 3 Munf. 66.

(2) See *Bradley v. Hitchcock*, Kirby, 231.

will be allowed all costs which he may have incurred in asserting or defending his right under the mortgage ; thus, where a mortgagee had filed a bill of foreclosure, he was allowed the costs he had incurred in procuring administration to an annuitant under the will of the mortgagor, such annuitant being a necessary party to the foreclosure (i). So where an infant claiming under a mortgagor had endeavored to defeat the mortgage by setting up a supposed entail, after a special verdict, and a great agitation at Law, the mortgagee prevailed, whereupon the infant brought his bill to redeem, and the mortgagee swore that he had expended above 120*l.* in defending his mortgage at Law, although he had but 60*l.* costs allowed him there, it was held that he should not be held down to his taxation at Law, but should, upon the account, be allowed all he had laid out or expended (k). And it appearing that the mortgagee, fearing his mortgage would have been defeated at Law, got administration as creditor in the Ecclesiastical Court, he was allowed his costs expended there also (l).

In what Case  
Costs do not  
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Result.

And so in another case, where a first mortgagee, after he had been put to great expense in suits to foreclose, and otherwise, in respect to the estate, had a bill filed against him by a second mortgagee to redeem, the Court ordered that his costs should not be taxed as in an adversary suit, but that he should be allowed all his costs and expenses, as is done in the case of a solicitor who lays out and disburses money for his client, the rents to be applied, in the first place, to pay such costs before they were applied to sink the principal (m). And on a bill for redemption, Sir J. Leach, M. R., gave to the mortgagee the costs of an action which he had brought against a person who had joined the mortgagor in a bond for the mortgage money, the fruit of the action being lost by the insolvency of the estate ; and his Honor stated the principle to be, that the mortgagee was entitled to be allowed in account, against the mortgagor, all expenses properly incurred for the recovery of the mortgage money (n).

— or in n  
covering the  
mortgage  
property.

Upon the same principle it is stated, that if a mortgagee or real creditor is brought before the Court to have his security impeached, if the bill is dismissed there is hardly an instance in which it is not with costs, for being brought before the Court without just

Bill against  
mortgagee,  
&c., always  
dismissed with  
costs.

- (i) Hunt v. Fownes, 9 Ves. 70. costs of defending his right of possession at Law. Dryden v. Frost, 3 M. & C. 670.  
(k) Ramsden v. Langley, 2 Vern. 536 ; 1 Eq. Abr. 328.  
(l) Ibid. But a mere equitable mortgagee will not be entitled to the  
(m) Lomax v. Hide, 2 Vern. 185.  
(n) Ellison v. Wright, 3 Russ. 458.

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Costs do not  
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Result.

— *secus* in  
a case of great  
hardship.

Rule that  
mortgagor is  
to pay all costs  
does not apply  
where claims  
are adverse ;

or where mort-  
gagee be-  
comes insol-  
vent after bill  
filed,  
or assigns his  
interest.

Where mort-  
gagee a luna-  
tic.

When a sale is  
directed the  
mortgagee is  
entitled to his  
costs in the  
first instance.

grounds, the Court would not do him justice, unless costs were given to him, as he is a creditor and incumbrancer (*o*).

In *Brodie v. St. Paul* (*p*), however, where certain mortgagees and trustees were brought before the Court upon a bill for a specific performance of an agreement for a lease, not for the purpose of impeaching their title, but as necessary parties to confirm the lease, and the bill was dismissed against the principal party without costs on account of the hardship of the case, the mortgagees and trustees were refused their costs ; Mr. Justice Buller, who heard the cause, saying, that if the decree had been for the plaintiff, perhaps he might have given the trustees their costs, because he could have given them over against the other defendants : but that, as it was, they must have their remedy against their principal.

It is to be observed, that the rule that the mortgagor is to pay the costs of the mortgagee and of those made necessary parties by his act, does not apply where their claims are adverse to each other ; thus, where the plaintiff was devisee of a mortgagee, and filed his bill against a mortgagor for a foreclosure, making the heir at law of the mortgagee a party to a bill to redeem in order to have the will established against him, Sir L. Kenyon, M. R., thought the estate ought not to be burthened with his costs (*q*). So where the mortgagee, after bill of foreclosure filed, became insolvent, the costs of his assignee, made a defendant, were not thrown on the mortgaged estate (*r*). And in general, if a mortgagee, after a decree to account, assigns his interest to another, the costs of the supplemental bill necessary to bring the assignee before the Court must be paid by the mortgagee (*s*).

It has been supposed that the rule that a mortgagee is to have his costs paid, is subject to another exception in cases where he is a lunatic ; and that in such cases the costs of a committee of a lunatic mortgagee, requisite to enable him to convey to the mortgagor under the statute (*t*), are to be paid out of the lunatic's estate. It appears, however, from the language of Lord Cottenham, that this exception would not hereafter be recognised by the Court (*t*).

The right of a mortgagee or incumbrancer to his costs will prevail in cases in which the Court directs a sale of the property pledged ; thus if a mortgagee files a bill against a mortgagor and

(*o*) Per Lord Hardwicke, *Taner v. Ivie*, 2 Ves. 466, 468.

(*p*) 1 Ves. J. 326.

(*q*) *Skipp v. Wyatt*, 1 Cox, 353.

(*r*) *Horam v. Woolongham*, 1 Beat.

(*s*) *Barry v. Wray*, 3 Russ. 465.

(*t*) In *Re Marrow*, Cr. & Ph. 142, where the cases upon the subject are collected.

subsequent mortgagees to foreclose, but, at the hearing, consents to a sale, he will be entitled to the payment of his costs, before the subsequent mortgagees receive any part of their principal, interest, or costs, the practice of the Court being to direct each mortgagee to be paid his principal, interest and costs, according to his priority (x).

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Result.

This position is at variance with the rule laid down by Lord Erskine in *Kenebel v. Scrafton* (y), which is stated to be incorrectly reported, but it appears to be in accordance with the principle of the Court as laid down by Lord Keeper Henley in *Belchier v. Butler* (z), viz., that the rights of the mortgagees are not altered by turning the mortgaged estate into money, for the Court directs the money to be applied according to the rights of redemption, and was acted upon by the V. C. of England, in *Upperton v. Harrison*, above referred to, where the produce of the sale, not being sufficient to pay the principal and interest due to the first mortgagee, his Honor directed the whole fund to be paid over to him. The same rule has been acted upon in other cases (a), and has been applied to incumbrances of a different description; thus, where a legacy was charged upon land, and the legatee filed a bill to raise the amount by sale of the estate, to which bill a person to whom the residuary devisee had mortgaged the estate, was made a party, and it appeared by the Master's report that the produce of the sale was not sufficient to pay the legacy in full, the Court refused to give the mortgagee of the residue his costs out of the fund. Where, however, after an equitable mortgage, the mortgagor died leaving an infant heir and the Court directed a sale, the personal estate being insufficient, and ordered the infant to join in the requisite conveyances, his costs of suit and of executing the conveyances were directed to be paid out of the proceeds, although they were insufficient to satisfy the mortgagee (b).

Rights of  
mortgagees  
not altered by  
the estate  
being turned  
into money.

It is to be observed, that this rule will not apply where the suit is instituted by a subsequent incumbrancer to ascertain priorities, &c., making a prior mortgagee or incumbrancer a party. In such case the subsequent incumbrancer ought to offer by his bill to redeem the prior incumbrances, and, if he omits to do so, the prior

— *secus*  
where bill is  
filed by a subsequent incumbrancer to ascertain priorities.

- (x) *Upperton v. Harrison*, 7 Sim. 444.      kin v. Roberts, Reg. Lib. B. 1742, fo. 628.  
(y) 13 Ves. 370.      (b) *Bibby v. Shufflebotham*, Beam.  
(z) 1 Eden, 523.      on Costs, ed. 1840, p. 30; with respect to the costs of mortgagors or their assigns disclaiming, see ante, p. 810-11.  
(a) Vide *Davies v. Topp*, Seton on Decrees, 97; *Wride v. Clarke*, ibid. 105; *Geary v. Geary*, ibid. 173; *Wakeham v. Lome*, ibid. 275; *Ton-*

Is what Cases  
Costs do not  
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Result.

incumbrancer has a right to insist upon being dismissed with costs. But if the prior incumbrancer, instead of asking to be dismissed, consents to a sale and to take his principal and interest out of the proceeds, as he thereby adopts the suit and takes the benefit of it, he must contribute to the costs of it; therefore the costs of all parties will be paid out of the fund, even though there may not be enough left to pay the prior incumbrancer his principal and interest (c).

Mortgagee  
misconducting  
himself re-  
fused his  
costs,  
Where he had  
(being a solic-  
itor), taken se-  
curity for his  
debt without a  
settlement of  
account.

The rule above laid down, that a mortgagee or incumbrancer is entitled to his costs as well as to his principal and interest, is liable to exception, also, in cases in which the Court considers the party guilty of any misconduct with reference to the suit, or the subject of it. In *Detillin v. Gale* (d), Lord Eldon said, "Though a mortgagee, acting reasonably as such, is to have his reasonable expenses, it does not follow that he can claim his own expenses from other persons, with whom he is litigating, with regard to those acts, which, upon his part, are not only unreasonable but grossly oppressive." In that case the mortgagee was deprived of his costs of that part of the suit where he had been guilty of improper conduct: — viz., being a solicitor, he had taken a security for his bill without any settlement of account, and had vexatiously occasioned great delay and expense in the progress of the suit (e). So where a mortgagee set up an unjust defence, insisting on his deed as an absolute purchase, he was deprived of his costs (f). And from the recent case of *Smith v. Green* (g) it appears that if a first mortgagee receives from a second mortgagee a tender of all that is due for principal, interest, and costs, the first mortgagee will not be entitled to costs of a foreclosure suit after the tender.

Where he sets  
up an unjust  
defence.

Mortgagee  
ordered to pay  
costs.

In *Detillin v. Gale*, above referred to, Lord Eldon appears to have expressed an opinion, not only that a mortgagee might be deprived of his costs, but that, under some circumstances, he might be called upon to pay costs. He said, "it will be an extremely bad precedent to hold, that in no case a mortgagee can be called upon to pay the costs of the mortgagor; I will not say the Court will not, and am very far from saying the Court ought

(c) *White v. Bishop of Peterborough*, Jac. 402; vide etiam, *Brace v. The Duchess of Marlborough*, Mos. 50; *Pace v. Marsden*, Seton on Decrees, 274.

(d) 7 Ves. 583.

(e) *Beames on Costs*, (ed. 1840), p. 27. More than a sixth part being

taken off his bill, he was ordered to pay the costs of so much of the suit as related to that bill, n. (g).

(f) *Francklyn v. Fern*, Barnard. 30; vide etiam, *Sevier v. Greenway*, 19 Ves. 413; *Kirkham v. Smith*, 1 Ves. 258.

(g) 1 Coll. 555.

not, to make that precedent, but it ought to be made upon very great consideration." His Lordship afterwards referred to the case of *Shuttleworth v. Lowther* (h), in which Lord Lonsdale, a mortgagee, was made to pay costs (on the ground of a tender and an appropriation of the money, which was paid into the bank and refused), as affording an instance in which a mortgagee had been made to pay the costs; and there are other cases in the books which may be cited in support of the same proposition. Thus, in *Mocatta v. Murgatroyd* (h), the mortgagee was ordered to pay the costs to the plaintiffs who were indorsees of subsequent mortgages and bills of sale, but he was not to have his costs over against the first mortgagor: in regard, the Lord Chancellor said, that it was not reasonable that he should overrate his pledge with costs occasioned by his unjust defence (i); and the principle has been recently acted upon in *Harvey v. Tebbutt* (k), where a mortgagee, who had resisted the right to redemption, by setting up a decree of foreclosure collusively obtained, was decreed to pay so much of the costs as was occasioned by his resistance (1).

In *Hammerton v. Rogers* (l), where a mortgagee by his bill of foreclosure attempted to tack a bond to a mortgage against creditors, his bill was to that extent dismissed with costs; and in

In what Cases  
Costs do not  
follow the  
Result.

Where he has  
refused a tender  
of principal and interest.

Where a mortgagee has  
insisted upon a  
fraudulent decree of foreclosure,

— or has  
attempted to  
tack a bond

(h) Cited *ib.* 586; it is somewhat singular that in referring to the same case in — *v. Trecothick*, 2 V. & B. 181, his Lordship appears to have thought Lord Thurlow's decision to have been different from that which he stated it to have been in the case in the text, and to have expressed his dissatisfaction with it, saying that he should have had no difficulty in giving the mortgagee his costs.

ing the mortgagee his costs.

(h) 1 P. Wms. 393.

(i) Vide etiam, *Baker v. Wind*, 1 Ves. 160; *England v. Codrington*, 1 Eden, 169; *Lord Cranstown v. Johnston*, 5 Ves. 277; *Taylor v. Baker*, Daniell's Exch. Rep. 71.

(k) 1 Jac. & W. 197.

(l) 1 Ves. J. 513.

(1) Where a defendant sets up a judgment, which was satisfied, and a mortgage in which he claimed more than was due, he was held not entitled to costs against the plaintiff. *Brinkerhoff v. Lansing*, 4 John. Ch. 79.

And the plaintiff, who failed in supporting his charge that the mortgage was satisfied, and kept on foot by fraud, was also held not to be entitled to his costs. *Brinkerhoff v. Lansing*, 4 John. Ch. 79.

Where the mortgagee sets up an unconscientious defence, he is not only refused costs, but must pay costs to the other party. *Slee v. Manhattan Co.* 1 Paige, 46.

So if he improperly resists the claim of the plaintiff to redeem. *Vroom v. Ditmas*, 4 Paige, 527. See also *Van Buren v. Olmstead*, 5 Paige, 9; *Brockway v. Wells*, 1 Paige, 617; *Saunders v. Frost*, 5 Pick. 271-274; *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

Where the plaintiff in a suit to foreclose so mistakes the rights of the defendant as to render it necessary for him to put in an answer to protect his rights, the plaintiff may be personally charged with the extra costs occasioned thereby. *Union Ins. Co. v. Van Rensselaer*, 4 Paige, 85.

In what Cases  
Costs do not  
follow the  
Result.

— or has lost  
his deed.

Mortgagee not  
refused costs  
except upon  
misconduct.

Not where he  
has claimed  
more than he  
is entitled to,

or where he  
has suggested  
a doubt upon  
which the  
Court has di-  
rected an  
issue.

Where mort-  
gagee in pos-  
session after  
principal and  
interest paid  
off.

Costs not giv-  
en against a  
defendant who  
has offered  
terms which  
would have  
rendered suit  
unnecessary.

*Stokoe v. Robson* (*m*), where the difficulty in the suit was occasioned by the loss of the mortgage deed, the mortgagee was ordered to pay the costs.

But although a mortgagee may, under peculiar circumstances, not only be deprived of his costs but be ordered to pay them, there must be positive misconduct on his part to bring such a visitation upon him (*n*); the mere circumstance that he has extended his claim beyond what the Court finally decides he is entitled to, will not be a ground for refusing him his costs (*o*), and, although he may have suggested a doubt as to the mortgagor's title to redeem, yet, if the Court thinks there is sufficient ground for entertaining such doubt, he will not be charged with the costs even where his doubt eventually proves unfounded. Thus where on a bill, by a devisee, to redeem, the mortgagee insisted that the heir of the mortgagor was alive, and, upon a reference, the Master reported him to be dead, whereupon an issue was directed to try whether he was living or dead, upon the trial of which the jury found that he was dead, Sir J. Leach, V. C., determined that the mortgagee must not pay the costs of the issue, as he could not be charged with vexation in a case where the Court thought there was so much weight in his objection as to direct an issue (*p*).

It may be collected, also, from several cases (*q*), that the right of a mortgagee to his costs is not defeated by the circumstance of his having remained in possession of the estate after the rents and profits received by him have been sufficient to pay off the principal money and interest due upon the mortgage; the estate being considered as much a security for costs as for the principal and interest; and a decree for costs almost necessarily following a decree for payment of principal and interest (*r*). If, however, a mortgagee in possession files a bill for a foreclosure, and it turns out, on taking the account, that on the day on which the bill was filed (to which time the account will be directed) nothing was due to him, he must bear the expense of the suit (*s*).

In coming to a decision upon the subject of costs, the Court is frequently governed by its wish to discourage unnecessary litigation.

(*m*) 19 Ves. 385.  
(*n*) *Loftus v. Swift*, 2 Sch. & Lef. 642, 657.  
(*o*) *Ibid*.  
(*p*) *Wilson v. Metcalfe*, 3 Mad. 45.  
(*q*) *Owen v. Griffith*, 1 Ves. 350;  
*Ambl.* 520, S. C.; *Trimbleston v. Hamill*, 1 B. & B. 377; and *Wilson v. Metcalfe*, 1 Russ. 530; *sed vide*

*contra*, *Woodroft v. Soys*, MSS. cited *Beames on Costs*, ed. 1840, p. 26.

(*r*) *E. I. Company v. Ekins*, 2 Bro. P. C. 382; 6 Vin. Ab. 365, pl. 13; *Thomas v. Puddlebury*, Sel. Ca. Ch. 51.

(*s*) *Binnington v. Harwood*, T. & R. 477-485.

tion. In *Millington v. Fox* (t) Lord Cottenham said that he was very much disposed, as a general rule, to make the costs follow the result; because, however doubtful the title may be, or however proper it may be to dispute it, it is but right that the party who really has the right should be reimbursed, as far as giving him the costs of the suit can reimburse him; "but then," his Lordship continued, "there is another object which the Court must keep in view, namely, to repress unnecessary litigation, and to keep litigation within those bounds which are essential to enable the parties to vindicate and establish their rights;" and accordingly his Lordship, although he held that the plaintiffs were entitled to part at least of the relief they prayed, i. e., a perpetual injunction, refused to give them the costs of the cause; because it appeared that the defendants had written to the plaintiffs a letter offering terms which would have rendered the suit unnecessary, which letter, his Lordship held, as to costs at least, rendered it incumbent on the plaintiffs to put to the test, whether the defendants were sincere in their offer, and not to go on with the suit unless they found that they were insincere (u).

In what Case  
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follow the  
Result.

In the above case, it is to be remarked, that the letter of the defendants was written before the institution of the suit, but was not received by the plaintiffs until after the bill had been filed. Under these circumstances Lord Cottenham found no fault with the commencement of the suit, but he said "that having received that letter, it was not proper for the plaintiffs to apply *ex parte* for the injunction; or if they had obtained an order for it, they should not have drawn up the order." Notwithstanding, however, the fact that the plaintiffs did not put themselves in the wrong until after the bill was upon the file, Lord Cottenham refused them the costs of the suit, including those incurred before the receipt of the letter.

The principle, therefore, to be deduced from the case seems to be, that if a plaintiff proceeds with a cause after he has received a complete offer of all that he is entitled to, the Court, in the exercise of its discretion with respect to costs will punish the unnecessary litigation by refusing him the whole costs of the suit, as well those incurred after the tender as those incurred before.

This principle was not, however, adopted by Sir J. Wigram, V. C. to its full extent, in the case of *Colburn v. Simms* (x), for although the defendant in that case had written a letter to the plain-

Where there  
has been a  
sufficient ten-  
der.  
  
Whether  
plaintiff re-  
fused his  
whole costs,  
or only those  
incurred after  
the tender.

(t) 3 M. & C. 352.

Graham, 2 R. & M. 353.

(u) Ibid.; and see *Meader v. M'Cready*, 1 Moll. 119; *Macartney v.*

(x) 2 Hare, 543.



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Result.



tiffs, offering every thing which his Honor considered they were entitled to demand, yet he only refused the plaintiffs such costs as were incurred after the plaintiffs were in the wrong; and he observed, that in the case of *Millington v. Fox*, Lord Cottenham's attention was not called to the fact that the expense of filing the bill had been incurred before the plaintiffs received the letter offering compensation.

Tender of no  
effect unless it  
extends to all  
that the plain-  
tiff can strictly  
demand.

It may be remarked, that unless the offer of the defendants extends to every thing that the plaintiff has a right to demand, whether in the nature of relief or of costs, the Court will not punish the plaintiff for declining the offer by refusing him his costs. And this will apply, even though the plaintiff has himself made demands to which he was not entitled; for instance, in the case of *Kelly v. Hooper (y)*, the Court was of opinion that the plaintiff had a right to require an answer to be put in; this right he refused to waive, unless his costs as between solicitor and client were paid, to which he was not entitled. Under these circumstances Sir J. L. Knight Bruce, V. C. said, "If the plaintiff had a fair right to require that step, he had a clear title to sell it for such terms as he might think adequate, and it was equally the right of the defendant, if he thought fit, to refuse that bargain." The defendant was therefore decreed to pay the whole costs of the suit.

Where there  
has been a ten-  
der of the  
amount due.

In the case of a mortgage, as we have before seen, it has been held that a *tender*, by the defendant to the plaintiff, of the sum due will save the costs of the suit (1). Thus, although a mortgagee is in general considered entitled to his costs, yet, where he has refused a tender of principal and interest due, the Court has not only refused him his costs, but has ordered him to pay the costs of the mortgagor (z). The tender, however, must, in such case, be made before the bill is filed; if afterwards, it must be accompanied with a tender of the costs incurred by the mortgagor (a).

(y) 1 Y. & C. 197.

(z) Vide *Shuttleworth v. Lowther*, cited by Lord Eldon, in *Detillin v. Gale*, 7 Ves. 582-586; vide etiam, — *v. Trecothick*, 2 V. & B. 181; *Williams v. Sorrell*, 4 Ves. 389; and *Roberts v. Williams*, 4 Hare, 129; *Smith v. Green*, 1 Coll. 555, and ante, page 1530.

(a) By the statute 7 Geo. II. c. 20, a summary remedy is provided for a

defendant in a bill of foreclosure, who, under its authority, may, at any stage of the cause, obtain a reference to the Master to ascertain the amount due to the mortgagee for principal, interest, and costs, and upon payment of the amount may redeem the estate, in the same manner that he may upon a decree made at the hearing, vide post, "Interlocutory Applications."

(1) See *Smith v. Bailey*, 10 Vermont, 163.

And the rule appears to be general that, wherever costs have been necessarily incurred by a plaintiff in seeking a demand, a tender by the defendant to obviate future costs must extend to the costs already incurred (*b*).

In what Cases  
Costs do not  
follow the  
Result.

It is, however, to be remarked, that a plaintiff in refusing to accept a tender of the amount due, because the costs do not form part of the tender, must be careful to ascertain that costs have been actually incurred by him, otherwise he will subject himself to the payment of any future costs which he may occasion to the defendant. Thus where a plaintiff, as lessee by parol, of an inappropriate rectory, filed his bill for tithes, and, in consequence of a demurrer which he had submitted to, had amended the bill by adding the inappropriate rector as a party, but before such amendment was made, the defendant had tendered the value of the tithes, which the plaintiff refused to accept without the costs, the Court, on the cause coming on to be heard, (the defendant having proved his tender,) decreed him to pay the plaintiff the money tendered, and the plaintiff to pay to the defendant the costs of the suit, because at the time of the tender no costs were due, the plaintiff having then no title (*c*).

Tender made  
after bill filed,  
must extend  
to costs,  
if any have  
been actually  
incurred.

A tender, to be effective, must be of the whole sum due, and as has been stated, of the costs, if any have been incurred; and if a tender is refused, and it afterwards appears that the sum actually due exceeds the amount tendered, the defendant will not be exempted from costs (*d*). A tender must also be specific, and although it may be of a larger sum than is actually due, yet, if such tender is coupled with a direction to the plaintiff to take out of it such a sum as is actually due to him, it will not be good (*e*). So also, if the tender be clogged with conditions, which the party has no right to impose (*f*), it will not be effective to excuse the party making it, from his costs; therefore, where an executor, although he had offered to pay a legacy given to the plaintiff, for her life, and afterwards to her children, had qualified his offer, by insisting that it should be laid out in such security as he should approve of, Lord Gifford, M. R., ordered the costs to be paid out of the testator's general estate to which the executor was entitled as residuary legatee, on the ground that the executor had no right to add such a stipulation to his offer.

Tender must  
be for the  
whole sum,  
due,

— must be  
specific,

— and must  
not be clogged  
with improper  
conditions.

- (*b*) Worral v. Miller, 3 Anst. 632. 1302; Beames on Costs, 68.  
(*c*) Henning v. Willis, 3 Gwill. 898; Beames on Costs, 67. (*e*) Drake v. Brooking, 2 Gwill. 594; and vide Rumney v. Willis, 2 Gwill. 775; Beames on Costs, 69.  
(*d*) Taylor v. Hall, 2 Gwill. 611, notis; Worral v. Nicholls, 4 Gwill. (*f*) Walter v. Patey, 1 Russ. 375.

In what Cases  
Costs do not  
follow the  
Result.

Tender must  
be legal.

Defects in,  
will not be  
supplied  
against rule at  
law.

Must be  
proved.

Where there  
has been a  
disposition to  
account,

— though  
balance is  
against  
accountant,

— even  
though he be  
a trustee.

*Socus* where  
party has mis-  
behaved him-  
self;

If a tender is not legal, a Court of Equity will not support it; nor will it supply a defect in a tender against a rule of Law, unless perhaps, where fraud is used to prevent its operation (*g*); and where parties came into this Court, to be relieved from a legal demand, on the ground that they had made a tender, Lord Hardwicke refused to relieve, because the tender might have been pleaded at Law (*h*).

It is to be recollected also, that a tender must, as has been mentioned before (*i*), be proved; a mere statement of it in an answer, is not sufficient to save the costs.

The principle upon which the Court acts, in admitting a tender, duly proved, as a ground for excusing the party making it from payment of costs; viz., the encouragement of attempts to prevent litigation, will apply to cases of account, where, although from the uncertain state of the account, the accounting party is not able to make a specific tender of the balance due from him, yet, if he has shown a willingness to render an account, the Court will, upon final adjudication, take such willingness into consideration, and exonerate him from paying the costs to the other party, although the result may be that the balance is against him (*k*).

Thus, on a bill filed to call a trustee to an account, it was held, by Lord Keeper Coventry, that if he by answer submits readily to it, though on the account he be found in debt, yet he shall pay interest for the balance, only from the time of the account liquidated, and no costs if he has not misbehaved himself (*l*). — In that case, however, the defendant had said in his answer, he believed the plaintiff considerably indebted to him, and after the matter had depended twenty years, was found 200*l.* in the plaintiff's debt; and the Lord Keeper therefore decreed, that he should pay interest from the time of the bill; "for he had admitted, by his answer, that he had not kept any money for the plaintiff useless or unemployed, and in a manner had dared the plaintiff to the account, and, therefore, must pay the costs, as the plaintiff must have done, if he had been found indebted to him (*m*)."  
So where

(*g*) Per Lord Hardwicke, in *Gamon v. Stone*, 1 Ves. 339.

(*h*) Ibid.

(*i*) Ante, p. 1520.

(*k*) This, however, is not strictly applicable to cases of *mutual* account, in which it is said, that the constant course of the Court is to reserve costs till after the report, that the Court may have it in its power to punish the wrong doer; vide *Rider v. Bayley*, 8

Bro. P. C. 361 (8vo ed.); 6 Vin. 332; 2 Eq. Ca. Ab. 237, S. C.; Beames on Costs, (ed. 1840,) p. 6.

(*l*) *Parrot v. Treby*, Prec. in Ch. 254; vide etiam, *Bennett v. Atkins*, 1 Y. & C. 247; *Ashburnham v. Thompson*, 13 Ves. 402; sed vide *Atty.-Gen. v. Brewers' Company*, 1 P. Wms. 376.

(*m*) See preceding note (*l*).

a bill was filed against an *elegit* creditor, for an account, who, knowing that the balance was against him, contested the mode of taking the account and failed, he was ordered to pay such part of the expense of taking the account as was incurred after his debt was paid off (n).

In what Case Costs do not follow the Result.

Where *elegit* creditor has improperly contested the mode of taking the account.

Rule in case of incumbrancer

It is to be observed that, in the above case, the defendant was fixed with the costs, on the ground that he had improperly contested the mode of taking the account, otherwise he would not have been made to pay them; the rule of the Court being, as we have seen, that an incumbrancer upon an estate is not bound to deliver possession, until his costs are paid, as well as his principal and interest, the estate being as much a security for one as the other (o).

It may be collected, from many of the cases referred to, that the Court regards, in some respects, the granting of costs to a party somewhat in the light of a testimonial of good conduct; and that it will, generally, withhold such testimonial from a party who has been guilty of any misconduct, with reference to the subject of the suit (p), even where, under other circumstances, that party would have been considered entitled to them. This position is strongly exemplified in the case of mortgagees or incumbrancers, whose *prima facie* right to costs may, as we have seen, be defeated by their conduct (q). And so, although there is no rule more general with respect to costs, than that "where the bill claims, on the ground of fraud, the decree or order of dismissal shall, in either event, be with costs" (r), yet, where the party succeeding, is *particeps criminis*, the Court will not consider him entitled to the costs of the litigation, — as in the case of bills for the delivering up of securities, given upon considerations which are contrary to the policy of the law, such as marriage — brokerage bonds, &c.; in such cases, although the Court, acting upon principles of public policy, will set aside the bond at the instance of the husband, yet it will do so, without giving him the costs of the suit which he has instituted for that purpose; and so where a bill was filed for delivering up a bond, given by the plaintiff to the defendant's wife in consideration that she would use the influence and power she had over the plaintiff's grandfather, (an old man of eighty-two,) to induce him to leave his whole estate to the plaintiff, the Court,

Where conduct of the successful party has been improper.

When he has been *particeps criminis*.

(n) *Skirrett v. Athy*, 1 B. & B. 430. (p) *Armstrong v. Blake*, 1 Moll. 178.  
(o) Ante, p. 1531; *Owen v. Grif- fith*, 1 Ves. 250; *Ambl. 520*, S. C. (q) Ante, p. 1532-3.  
(r) *Scott v. Dunbar*, 1 Moll. 442.

In what Cases  
Costs do not  
follow the  
Result.

Where a  
transaction is  
set aside as an  
unconscien-  
tious bargain.

although it set aside the bond as being given without consideration, gave no costs on either side (s).

It is to be recollected here, that, in some of those cases in which the Court will interfere to set aside a transaction which is contrary to principles of public policy, it frequently gives costs to the unsuccessful party; the cases alluded to as instances of this departure, are those in which the Court orders securities to be given up or sales to be set aside, on the ground that the bargain is unconscientious, and in which it gives the defendant his costs (t), as well as the principal and interest of the money he has paid. In those cases, however, the Court proceeds upon the ground that the person advancing the money is to be treated as an incumbrancer upon the property, and the decisions cannot, therefore, be considered as infringing at all upon the principles which govern the Court in the ordinary case of frauds. It may be mentioned here, that, in a case before Lord Abinger, L. C. B., where a trustee had purchased trust property and afterwards sold it at a profit, the trustee, although he was compelled to refund the profit he had made, yet, as there was nothing in his conduct to affect him with *moral fraud*, he was not fixed with the costs of the suit (u).

Where there  
has been an  
improper con-  
cealment.

The rule upon which the Court acts in depriving a successful party of his costs, where he has been guilty of fraud or other misconduct of that description, has been extended to cases where there has been an improper concealment not amounting to a fraud. Thus where a woman, before her marriage, had, for a valuable consideration, entered into a bond for the payment of a sum of money to the defendant, who, at her request, concealed the transaction from her husband, and the husband, after the wife's death, brought a bill to be relieved from the bond, Lord Hardwicke, although he held that where a debt is contracted by a wife before marriage, for a valuable consideration, concealment of it from the husband is no fraud on the marriage, and therefore dismissed the bill, said, that concealment of such debts and securities is not to be encouraged, and that, therefore, he should have excused the husband his costs, on dismissing his bill, had it not been for the circumstance that it was at the request of the wife herself, whose representative the husband was, that the obligee had concealed it from the husband, which, if she had survived her husband, would not have deprived the obligee of his costs.

(s) *Debenham v. Ox*, 1 Ves. 276.  
(t) *Ante*, p. 1525.

(u) *Baker v. Carter*, 1 Y. & C. 259, Exch. Rep.

It may be noticed here, that the Court not only expects that there should be an absence of fraud, on the part of the party applying to it for relief, but even where there has been no positive fraud, but the conduct of the party has not been strictly honorable, it will, in cases where the application is to the discretion of the Court, visit him with costs (x); and so if a party obtains an unconscionable advantage over another, the Court, although it may not feel itself justified in depriving him of the advantage he has gained, will not give him his costs of enforcing it; therefore, if a purchaser obtains a bargain at an inadequate price, but which the Court may be bound to enforce, it will not give him costs against the seller, whose estate he has obtained at an under value (y).

In what Case Costs do not follow the Result.

Where conduct has not been honorable.

Where the plaintiff has obtained an unconscionable advantage.

So where a plaintiff has slept upon his rights for a great number of years, and has allowed the defendant to suppose that he would not enforce them, he will frequently, although successful, be deprived of his costs; as, where there had been no demand nor any rent paid for thirty years, but the person who was entitled recovered upon a verdict, Lord Hardwicke said the defendant must pay the costs at law, but as the *laches* arose on the part of the plaintiff, and the obscurity of the title to the rent from the want of a demand for such a length of time, he should not be allowed costs against the defendant in Equity (z).

Where he has slept upon his rights.

In like manner where a legacy was given to an infant, and the executor advanced monies during his minority for his maintenance, and afterwards left him, by his will, a larger legacy than the one to which he was before entitled, upon a bill filed by the infant, ten years after he came of age, against the executor of the executor, claiming payment of the legacy and interest, the Court refused to allow the sums advanced by the executor for maintenance, or the legacy given by the executor, to be set off against the legacy given by the original testator, and decreed it to be paid with interest from the time of filing the bill, but, in consideration of the circumstances, and of no demand having been made for ten years, the decree was made without costs (a).

Sometimes, where there has been a misunderstanding between the parties, and the bill is in consequence dismissed, the Court will not give costs to the defendant: thus, where a bill was filed for a specific performance, and the Court was of opinion that there

Where there has been a misunderstanding.

(x) *Danis v. Symonds*, 1 Cox, 402. *v. Orchard*, 1 Atk. 610; *Pearce v. Burrowes v. Lock*, 10 Ves. Newlyn, 3 Mad. 186; vide etiam, 470; 3 Sugd. V. & P. ed. 1840, 147. *Guest v. Homfray*, 5 Ves. 818.  
(y) *Anon.* 2 Atk. 14; vide *Clifton* (a) *Lee v. Brown*, 4 Ves. 362.

**In what Cases Costs do not follow the Result.** was no concluded agreement, and that all the correspondence together did not amount to more than a treaty, it dismissed the bill, but, in consideration that it appeared to have been a case of misunderstanding, arising from the want of clear unequivocal conduct and language, it was dismissed without costs (*b*).

**Where party's own representation has given probable cause for suit.** The Court will also refuse costs to a vendor, although it decrees a specific performance at his suit, in cases in which the vendor's own representation has given the purchaser a probable cause of suit (*c*).

**Where the construction of doubtful points of law has given him a great advantage.** In cases also where one party, upon the construction of a doubtful point of law, has obtained a great advantage over the other, the Court will not give him his costs: as where an annuity was charged upon real estate, payable to the annuitant only upon his own receipt, and the annuitant became bankrupt, whereupon a bill was filed by his assignees against the owner of the estate for the recovery of the annuity, and a case was directed to the Court of King's Bench, who certified that the annuity had ceased by the bankruptcy,—upon the Equity reserved, the bill was dismissed without costs, the Master of the Rolls saying it was a doubtful point, and the defendant had a great advantage by the failure of the bankrupt, but that he would consider of the costs at Law (*d*).

**— where there has been a groundless allegation of fraud in the pleadings.** As the Court will not tolerate fraud in any form, so will it discountenance a groundless allegation of fraud in a bill or other pleading, and upon this principle it is that the rule, which has been before referred to, has been established, viz., that where the bill claims, on the ground of fraud, an order of dismissal shall be with costs (*e*); and so although a plaintiff may fail in establishing his claim, yet if the defendant has set up fraud or misrepresentation as a defence, which are disproved, he will be made to pay the costs occasioned by that defence (*f*), for “it is the duty of the Court to discourage the abuse of its proceedings by the introduction of imputations disgraceful to character, which prove to be altogether unfounded” (*g*) (1).

**Where conduct of both has been reprehensible.** Where the conduct of both parties has been equally reprehensible, the Court will also abstain from giving costs in favor of either party (2): thus, where the Master, under a reference to inquire

(*b*) *Stratford v. Bosworth*, 2 V. & B. 341; *Marquis of Townshend v. Stangroom*, 6 Ves. 328.

(*c*) *Fenton v. Browne*, 14 Ves. 144.

(*d*) *Dommett v. Bedford*, 3 Ves.

149.

(*e*) *Ante*, p. 1537; *Scott v. Dunbar*, 1 Moll, 442.

(*f*) *Wright v. Howard*, 1 S. & S.

190.

(*g*) *Ibid.* 206.

(1) See *Brinkerhoff v. Lansing*, 4 John Ch. 79.

(2) *Clark v. Reed*, 11 Pick. 446, 449; *Saunders v. Frost*, 5 Pick. 259, 274 *ante*, 1397.

into a vendor's title, reported that the abstract delivered by the vendor before the filing of the bill was sufficient, but he found that the purchaser required certain evidence in support of the abstract, some of which was necessary but not furnished, and some not necessary, the Lord Chancellor decided that both the parties were in the wrong; and upon the vendor's bill he held that no costs ought to be given on either side (g).

In what Case  
Costs do not  
follow the  
Result.

Where, however, the vendor had failed in making out his title, upon an objection to the abstract originally taken by the purchaser, but afterwards succeeded in establishing it upon another ground, the Court, although it directed the performance of the contract, gave the costs to the purchaser (h).

And where both parties had been equally foolish, the one in selling and the other in buying an estate, which was liable to be defeated upon a contingency, which contingency had actually happened before the contract was entered into, Lord Chief Baron Richards, although he set aside the contract, ordered each party to pay their own costs (i).

Where con-  
duct of both  
parties equally  
foolish.

We have seen above, that, in cases where the unsuccessful party has done all in his power to prevent litigation, either by offering a reference to arbitration or making a tender, or taking some step of that nature, the Court will not compel him to pay the costs of a suit which he has endeavored to avoid; still the Court is not so unreasonable as to expect him, for the purpose of avoiding litigation, to relinquish any right he may fairly be supposed to have; and it will therefore, if it appears that a party in resisting or asserting a claim, had *probabilem causam litigandi*, excuse such party from payment of costs, although the ultimate decision of the Court may be against him (k) (1).

Where the un-  
successful  
party had  
*probabilem*  
*causam liti-*  
*gandi*;

Thus it has been said, that, in suits for the specific performance of agreements for the sale or purchase of estates, the cir-

as in question  
of title.

(g) Newall v. Smith, 1 J. & W. 263.

(h) Fielder v. Higginson, 3 V. & B. 142; and see Sidebotham v. Barrington, 5 Beav. 261.

(i) Hitchcock v. Giddings, Dan. Ex. Rep. 1; 4 Pri. 135, S. C.

(k) Curs. Canc. 346. In Lord Ba-

con's Ordinances, 54, it is laid down, that, in all suits where it shall appear, upon the hearing of the cause, that the plaintiff had not *probabilem causam litigandi*, he shall pay unto the defendant his utmost costs, to be assessed by the Court, Beames's Ord.

24.

(1) Nicoll v. Trustees of Huntington, 1 John. Ch. 166.

Where an executor or administrator commences a suit in Chancery, in good faith, upon probable grounds of right, and to enforce a supposed claim of the testator or intestate, he will not be charged with costs. Murray v. Philips, 1 Paige, 472. See Arnoux v. Steinbrenner, 1 Paige, 82.



In what Cases  
Costs do not  
follow the  
Result.



cumstance of the title being bad, only makes a *prima facie* case for costs, which is capable of being rebutted by circumstances (*l*); and in *Staines v. Morris* (*m*), Lord Eldon remarked, that, as to the costs of a suit in Equity, although it was in many cases very hard that they should follow the event of the cause, yet all his experience had persuaded him that it was much to be wished that it was so, but that certainly it was not the present course of the Court, and that where there is a fair case for consideration, it is not the course to visit the party who fails with costs. In that case, his Lordship, although he held that the purchaser was wrong in resisting a covenant which he was bound to enter into, yet as the Master's opinion had been the other way, and the Judges at Law would not decide the case until they had the opinion of the Court of Chancery, and professional men had differed upon the question, it would, he said, be too presumptuous in him to set such a value on his own opinion, by marking the resistance of the purchaser with costs, and therefore he made the decree without costs (*n*).

Where there  
has been a  
contrary de-  
cision of an-  
other tribunal.

Upon the same principle, where a bill was filed against a purchaser for the specific performance of his agreement, and the question turned upon a point of law which had been determined in favor of the plaintiff's view, by the Court of Exchequer, Lord Loughborough, although he differed from the Court of Exchequer, and therefore felt himself compelled to dismiss the plaintiff's bill, yet as he could not make a purchaser take a title in the face of the decision of the Exchequer, he dismissed the bill without costs (*o*). And so in *White v. Foljambe* (*p*) Lord Eldon dismissed the bill without costs, the ground of his judgment, as his Lordship afterwards (*q*) said, being, that the question was a pure question of title; which raised very considerable difficulties in the minds of those most capable of judging upon such a subject.

— or where  
the question is  
one which has  
raised doubts  
amongst the  
profession,

— or where  
the Master's  
report in favor  
of title has  
been over-  
ruled.

And so where the Master had reported in favor of the plaintiff's title, and exceptions were taken to his report, upon the hearing of which the Court thought the title too doubtful, an order was made dismissing the plaintiff's bill, but without costs, returning to the purchaser his deposit on filing the exceptions (*r*).

- (*l*) *Edwards v. Harvey*, Coop. 40. 491. In this case the exceptions only had been set down for hearing, and not the cause, upon further directions; the consequence of which was, that the bill could not then be dismissed. The difficulty, however, was got over by ordering the exceptions to stand over for judgment, and
- (*m*) 1 V. & B. 8, 16.
- (*n*) Vide 3 Sugd. V. & P. (ed. 1840,) 87.
- (*o*) *Rose v. Calland*, 5 Ves. 187.
- (*p*) 11 Ves. 337.
- (*q*) Vide ib. 463.
- (*r*) *Wilcox v. Bellaers*, T. & R.

But although the Court will not in general visit a party with costs, who resorts to the Court in a doubtful case, where he has *probabilem causam litigandi*, yet if he is absurd enough to refuse a fair offer of accommodation, and obstinately persists in his suit, it is an aggravation, and his bill shall be dismissed with costs (s). And wherever the doubt has been occasioned by the conduct of the party himself, the Court will deprive that party of his costs, though he succeed in the suit (t).

In what Cases Costs do not follow the Result.

*Secus*, where the doubt has been occasioned by party's own conduct.

It is to be noticed that, where the Court comes to a decision upon a point of law which is contrary to a former decision, either of this Court, or of any other of competent jurisdiction, it will generally exonerate the party against whom it decides, from the payment of costs to his adversary, as in the case of *Rose v. Calland* (u), above referred to; but where the point has been decided before, and the Court thinks that the decision was correct, it will, if the party, against whose interest the decision is, had notice of the previous determination, fix him with the costs of the litigation; thus where a bill was filed for a specific performance, and the purchaser set up an objection to the title which had already been decided in a former case, of which the purchaser had notice, the purchaser was decreed to pay the costs of the suit (x).

Where the point has been differently decided before.

*Secus*, where Court comes to the same conclusion.

And here it may be remarked that, in suits for specific performance, it is not the mere failure of an objection, taken by the purchaser to a title, that will fix him with costs: a purchaser is considered as entitled to take a fair objection; and, although it be overruled, yet the Court will not, on that ground, give costs against him (y); this, however, must always depend upon the weight which the Judge may think due to the objection (z).

Party entitled to take a fair legal objection though unsuccessful.

It is, however, only where the case turns upon a question of law, upon which the opinion of the Court may be fairly taken, that the unsuccessful party will be excused his costs; if there is a decided objection to the case set up, the party setting it up will be compelled to pay them; thus where a vendor sells an estate, his title to which is clearly bad, the Court will dismiss his bill with

Where there is a decided objection to case set up, costs will follow the result.

then the defendant obtained an order by petition, that the cause should be set down to be heard upon further exceptions and costs, and that it should be advanced to be heard together with the exceptions which stood for judgment, *ibid.* 495.

(s) *Per* Lord Hardwicke, in *Biggleston v. Grubb*, 2 Atk. 48.

(t) *Blunt v. Cumyns*, 2 Ves. 231.

(u) 5 Ves. 186.

(x) *Biscoe v. Wilks*, 3 Mer. 456.

(y) 3 Sugd. V. & P. (ed. 1840), 141; *et vide* *Cox v. Chamberlain*, 4 Ves. 631; *Staines v. Morris*, 1 V. & B. 8; *Sharp v. Roahde*, 2 Rose, 192.

(z) 3 Sugd. V. & B. *ubi supra*; *vide* *Burnaby v. Griffin*, 3 Ves. 266; *Bishop of Winchester v. Paine*, 11 Ves. 195; *Powell v. Martyr*, 8 Ves. 146; *Fludyer v. Cocker*, 12 Ves. 25; *Calverley v. Williams*, 1 Ves. J. 210.

In what Cases  
Costs do not  
follow the  
Result.

— even  
though other  
objections are  
taken, which  
fail.

Principle in  
the case of  
bills for spe-  
cific perform-  
ance (1).

Opinion of  
counsel will  
not prevent  
consequences  
of a groundless  
objection.

costs (a); and this it will do even where the defect has been occasioned by an accident, as where the title deeds were burnt, after the contract (b); and it seems that if there is one decided objection to the plaintiff's case, which prevails, the circumstance, that the defendant has taken others which have failed, will not relieve the plaintiff from his costs; thus where a purchaser obtained an issue upon a question of pedigree in which the vendor failed in establishing his title, the bill was dismissed with costs, although the purchaser had taken several objections before the Master, and had only succeeded in the one relating to the pedigree, the Court observing, that, although the objections were overruled, they might have been very properly made, though an answer was given to them and they were removed (c).

The rule upon this subject is very clearly laid down by Sir J. Leach, V. C., in *Thorpe v. Freer* (d). If a purchaser makes the suit necessary by a frivolous objection to the title, he must bear the costs which he has improperly occasioned; but if he states a serious objection, as to which it is reasonable that he should have the title fortified by the opinion of the Court, the Court will not compel him to pay costs although the objection fails. The principle must be the same with respect to the purchaser's suggestion of doubt as to matter of fact (e).

It seems, however, that if the Court thinks an objection groundless, although it was supported by the opinion of counsel upon which the purchaser acted, yet the party taking it will be compelled to pay the costs; for the Court cannot allow the mistaken advice of a third person, to operate to the disadvantage of the party who is clearly in the right (f).

(a) *Playford v. Hoare*, 3 Y. & Jer. 175.

(b) *Bryant v. Busk*, 4 Russ. 1. In that case, the Court seemed inclined to make an order that the plaintiff should concur with the defendant in giving an order to the auctioneer to return the deposit paid by the defendant at the sale of the estate.

(c) *Edwards v. Harvey*, Coop. 40; vide *Townsend v. Champernowne*, 3 Y. & C. 505.

(d) 4 Mad. 466.

(e) Vide etiam, *Aislabie v. Rice*, 3 Mad. 256, 260.

(f) *Maling v. Hill*, 1 Cox, 186; vide etiam, *Vancouver v. Bliss*, 11 Ves. 458.

(1) A vendee entitled to specific execution of his contract, is entitled to costs. *Hart v. Brand*, 1 A. K. Marsh. 162. See *Dyer v. Potter*, 2 John. Ch. 152.

Costs are awarded on a decree correcting a mistake in a contract, on a bill for that purpose, and for specific performance. *Keisselbrack v. Livingston*, 4 John. Ch. 149.

See *Dustin v. Newcomer*, 8 Ohio, 49, where it was held, that a vendee, on obtaining a decree for specific performance, is not entitled to costs, where he has made no tender of the purchase money. And in *Galloway v. Barr*, 12 Ohio, 354, it was held that he is not entitled to costs, even if he was tendered the money, unless it is brought into Court.

And where one of the objections of a purchaser to a title arose from the circumstance, that, on an abstract which had been made use of on a former occasion, a certain observation appeared, implying a doubt whether a title could be made unless a particular appointment should be executed, and suggesting certain possibilities and probabilities which, if true, would render the title objectionable, Lord Eldon, being of opinion that a good title was made, said, that he should very reluctantly lay down that a notice from opinions in an abstract, or any thing that appears upon a deed, that there may by possibility be reason to suspect (what he could not know, and might not be true,) that the title was bad, was such a notice as would affect the purchaser, and that, if the objection was no more than a question of title, he should act hardly by the purchaser by not giving the title of making him pay the costs, "for it would help the title" (g).

In what Cases Costs do not follow the Result.

— nor the suggestion of unfounded doubts in an old abstract.

In most of the cases before stated, the Court, in withholding the costs of the suit from the successful party, has been influenced by the conduct of the party with reference to the suit or the subject-matter of it; there are, however, many cases in which the Court, without any reference to the good or bad conduct of any party, has refrained from awarding costs to be paid by the unsuccessful party, solely from consideration of the peculiar hardship of the individual case. Instances in which the Court has, upon this ground, departed from its general principle, are referred to in the note (k), and many others occur in the books; it is, however, useless to state them more fully, since they involve no general principle beyond what has been stated, and depend upon the circumstances of each case as they appeared to the Judge who heard it.

Where the case is one of peculiar hardship.

In *Lillia v. Airey* (i), the bill was dismissed without costs upon the suggestion of the plaintiff's counsel, acquiesced in by those for the defendant, that the plaintiff was very poor and unable to pay costs.

Where the unsuccessful party is very poor and unable to pay.

With reference to this part of the subject, it may be stated, that, in cases where Courts of Law have assumed a concurrent jurisdiction with Courts of Equity, but the latter have not relinquished their jurisdiction over the subject, the Court of Chan-

Where Courts of Law have a concurrent jurisdiction, rules of this Court with regard to costs not altered thereby.

(g) *M'Queen v. Farquhar*, 11 Ves. 467.

(k) *Shales v. Barrington*, 1 P. Wms. 481; *Drybutter v. Bartholomew*, 2 P. Wms. 127; *Coppin v. Coppin*, ib. 291; *Forbes v. Taylor*, 1 Ves.

J. 99; *Brodie v. St. Paul*, ib. 326; *Moseley v. Virgin*, 3 Ves. 184; *Dickenson v. Lockley*, 4 Ves. 36; *Everett v. Backhouse*, 10 Ves. 94.

(i) 1 Ves. J. 277.

In what Cases  
Costs do not  
follow the  
Result.



very will not compel the party who seeks relief under its jurisdiction to pay the costs of his proceeding: thus, where a bill was filed by one partner against another, to enforce contribution, and the Court allowed the case to stand over, in order that an action might be tried at Law, which was decided against the plaintiff, the Court, although it dismissed the bill, did so without costs, being of opinion that, although the question was more proper to be tried at Law, the plaintiff was very well justified in coming for a contribution, for certainly this Court had never given up its jurisdiction (*k*).

Bill dismissed  
without costs,  
on plaintiff  
waiving his  
right to sue  
at law.

On the other hand, in cases in which, after a bill dismissed here, the plaintiff would have had a right to try the question over again at Law, the Court, for the purpose of putting an end to litigation, has frequently dismissed the bill without costs, upon the plaintiff's waiving his right to try the question at Law (*l*); a rule which has been usefully applied to suits for specific performance (*m*).

It is to be remarked, that, in the cases which have been referred to, the Court has marked its opinion of the conduct of the parties, principally by withholding from the successful party the costs which, upon general principles, he would otherwise have been entitled to receive from his adversary, and that in no case, save in those of heirs at law and mortgagees and incumbrancers, and others partaking of those characters, has the Court compelled the party succeeding in the suit to pay the costs of it.

Whether when  
a bill is dis-  
missed, the de-  
fendant can be  
ordered to pay  
costs.

The general rule of the Court, indeed, seems to be, that the successful party, although he may, as we have seen, be deprived of his costs, never pays them. Thus, it was held, in *Lewis v.*

(*k*) *Wright v. Hunter*, 5 Ves. 792.  
(*l*) *Harnett v. Yielding*, 2 Sch. & Lef. 560; vide etiam, *Lawrenson v. Butler*, 1 Sch. & Lef. 21; *Buxton v. Lister*, 3 Atk. 386; *Underwood v. Hithecox*, 1 Ves. 279; *Leman v. Alie*, Amb. 163; *Attorney-general v. Owen*, 10 Ves. 555.

(*m*) *Beames on Costs* (ed. 1840), p. 112. Formerly, it was not unusual in decrees to direct, that, if a party in default should give further trouble to his opponent, the latter should be at liberty to apply to the Court for costs, *ibid.* 114; et vide *Harnett v. Yielding*, *ubi supra*; *Bradish v. Gee*, Amb. 229, ed. Blunt, n. 6; *Leman v. Alie*, *ib.* 163; which cases afford instances in which such a direction was given upon the dis-

missal of a bill. For instances in which such clauses have been inserted in decrees with a view to charge the defendants with costs, vide *Scarborough v. Burton*, 2 Atk. 111; *Barnard*, 255, S. C.; *Benson v. The Dean and Chapter of York*, *Belt's Supp. to Vesey*, p. 66; *Pearson v. Robinson*, Reg. Lib. B. fo. 506; but, in *Scarborough v. Burton*, *Ld. Hardwicke* appears not to have approved of clauses of this kind, and to have intimated that the question of costs should either be determined or reserved. In that case, however, such a direction having been inserted in the decree (which was by the Master of the Rolls), he made the order accordingly.

Loxham (n), that, when a bill is dismissed, it is against the principles of the Court to order the defendant to pay the plaintiff his costs. In that case it was ordered to stand over, in order to enable the plaintiff's counsel to search for precedents the other way, but he did not produce any. It seems, however, from the note of the learned reporter, that, in a case before Sir T. Plumer, V. C., his Honor doubted, and seemed to think that a bill might be dismissed, and the defendant at the same time made to pay the costs (o) (1); and it is to be observed, that, in *Cranch v. Brisset*, cited in *Wheldale v. Partridge* (p), where a bill was necessary to be filed by some person, Sir Thomas Sewell, M. R., ordered the costs to be paid out of the fund, though he felt himself obliged to dismiss the bill (q). It is right, however, to state that, in *Cogan v. Stephens* (r), Sir Charles Pepys, M. R., adhered to the rule, that, where the bill is dismissed, the defendant cannot be ordered to pay the costs. In that case, also, it was necessary that a bill should be filed, and the plaintiff was, in fact, almost the only party by whom the suit could, properly, be instituted; the fund being in the hands of the defendant as surviving trustee, though, from the conflicting opinions which existed as to the right to the fund, he could not appropriate it, till the claim of the plaintiff had been disposed of, by a decision of the Court.

Successful  
Party not to  
pay Costs.

(n) 3 Mer. 429; vide etiam, *Wykham v. Wykham*, 18 Ves. 395; *Attorney-general v. Oglander*, 1 V. J. 246; *Cooth v. Jackson*, 6 Ves. 41; *Dixon v. Parker*, 2 Ves. 219.

(o) *Springfield v. Ollett*, cited 3 Mer. 430, n. Indeed it appears, from the same note, that, according to the decree in *Lewis v. Loxham*, Reg. Lib. 1816, B. p. 1059, the defendant was ordered to pay to the plaintiff his costs of a second reference as to title, and of the report thereon, but not of the former proceedings, ib.

(p) 5 Ves. 598.

(q) Vide etiam, *Davis v. Symonds*, 1 Cox, 402; *Ash v. Burn*, 3 Moll. 97; and *Nicolson v. Wordsworth*, 2 Swan. 365, in which Lord Eldon is reported to have said, that when, on a bill by a vendee for specific performance, it appears that the defendant cannot make a good title, there is no further question in the cause than who is to pay the costs.

(r) Vide *Lewin on Trustees*, App. H. p. 608; *Hay v. Bowen*, 5 Beav. 610; *Westcott v. Culleford*, 3 Hare, 274.

(1) In *Brooks v. Byam*, 2 Story C. C. 554, it was remarked by Mr. Justice Story, "In the ordinary course of practice, if a bill be dismissed, the most that is done is, in proper cases, to dismiss the bill without costs to the defendant. I do not say that a case may not be put, in which the Court might go farther, and allow costs to the plaintiff, even upon the dismissal. But it must be a very extraordinary case; such, for example, as where the defendant has, by his own fraud, in misrepresenting himself to be the proper and sole party to be sued, as executor, or heir, or devisee, induced, nay, invited the plaintiff to bring the suit, and then has put in a plea, and established the fact that he is not executor, or heir, or devisee."—"But on this, I give no opinion. The present is not such a case."

Successful  
Party not to  
pay Costs.

Exceptions to  
the rule.

In cases of  
specific per-  
formance.

Where *cestui  
que trust* makes  
his trustee a  
defendant.

Some cases, however, are to be found in the books, in which the successful party has, under peculiar circumstances, been made to pay the costs; thus, in *Mortimer v. Orchard* (*s*), where the bill was filed for a specific performance of an agreement to renew a lease; the agreement proved by one witness was different from that stated in the bill, whilst the defendants, by their answer, set forth an agreement different both from that proved and that set up by the bill; but a specific performance was decreed according to the agreement stated in the answer, with costs against the plaintiff (*t*).

The learned author of the *Treatise on the Law of Vendors and Purchasers*, has also laid it down, that, if a purchaser files a bill for a specific performance, which is dismissed because the defendant, the seller, cannot make a title, yet the bill may be dismissed, with costs against the vendor (*u*), a doctrine which is supported by a *dictum* of Lord Eldon, in *Nicholson v. Wordsworth* (*x*), that, when, on a bill by a vendee for a specific performance, it appears that the defendants cannot make a good title, there is no further question in the cause than who is to pay the costs, — in that case, the bill was filed by the purchaser for a specific performance, insisting that the vendor could not make a good title, and the bill was dismissed with costs; and the corollary, drawn from it by Sir E. Sugden, is, that if a purchaser files a bill for a specific performance, insisting that the seller cannot make a good title, he must pay the costs whether he accept or refuse the title (*y*).

Another instance of departure from the rule that the successful party is to pay no costs, may be found in the case of a *cestui que trust* making his trustee a defendant to a suit instituted by him against a third party; in that case the *cestui que trust*, although he obtains a decree against his trustee, must pay his costs, unless the trustee has been applied to, to join in the suit as co-plaintiff and has refused (*z*). The proper course to be pursued by a *cestui que trust* who intends to file a bill against a stranger relative to the trust property, is stated to be, to apply to become a co-plaintiff indemnifying him against costs, and then, if he refuses, he must abide his own costs as a defendant (*a*); for it is a rule, that, if a suit is occasioned by the misconduct or obstinacy of a trustee, he may be compelled to pay the whole costs of it. Thus, where a

(*s*) 2 Ves. J. 243.

(*t*) Vide the observations on this case, in *Beames on Costs* (ed. 1840), p. 112; vide etiam, *Willis v. Yates*, cited *ib.* 154.

(*u*) 3 Sugd. V. & P. (ed. 1840),

137.

(*x*) 2 Swanst. 365.

(*y*) 3 Sugd. V. & P. (ed. 1840), 137.

(*z*) *Reade v. Sparkes*, 1 Moll. 8.

(*a*) *Reade v. Sparkes*, 1 Moll. 8.

bill for specific performance of an agreement was made necessary by a trustee refusing to join in the conveyance, Lord Thurlow was of opinion that the trustee ought to pay all the costs of the suit, and accordingly directed the plaintiff to pay to the other defendants all their costs of the suit, and recover them over, together with his own costs, from the defendant the trustee (b).

Successful Party not to pay Costs.

Where suit occasioned by the misconduct or obstinacy of trustee.

It is to be observed, that, in the case last referred to, the Registrar appears to have doubted whether, according to the practice of the Court, the plaintiff, having been successful against the other defendants, and obtained against them a decree for a specific performance, could, in point of form, be ordered to pay them their costs, but the Lord Chancellor thought that the decree was correct according to the course of the Court: and it is to be remarked that, in fact, no other method exists, by which a defendant, who has by his conduct occasioned the suit, can be made to pay the whole costs of it; for the delinquent defendant cannot be decreed to pay the costs of a co-defendant to that defendant himself, for that would in effect be a decree between co-defendants. The only method, therefore, of effecting the object of compelling the delinquent defendant to pay the costs of the other defendant, is to order the plaintiff to pay them, and then to permit him to receive them again from the defendant whose delinquency has given rise to the litigation (c).

Arrangement of costs, where one defendant is to pay the whole costs of the suit.

In deciding the question of costs, the Court will frequently apportion them, so as to cause the costs of one part of the suit to fall upon one party, and those relating to another part to fall upon the other party; thus, where a plaintiff claims several matters by his bill, and succeeds in establishing his right to a portion only of what he so claims, the Court will sometimes grant him a decree for that part of his case in which he is successful, with costs, to be paid by the defendant, and dismiss the remainder of his bill with costs, to be paid by himself (d).

Apportionment of costs between parties.

Where part of bill dismissed

So also, where there are several issues, and some are found for the plaintiff and others for the defendant, the parties will be allowed costs on issues found in their favor, and must pay on those against them (e).

Where several issues are found differently.

(b) *Jones v. Lewis*, 1 Cox, 199.

(c) Vide acc. *Weymouth v. Boyer*, 1 Ves. J. 416; *Parkes v. White*, 11 Ves. 209.

(d) Vide *Clinan v. Cooke*, 1 Sch. & Lef. 22. In such cases, also, the

Court sometimes contents itself, with making no order at all as to costs, the effect of which is to throw upon each party the payment of his own.

(e) *Prevost v. Benett*, 2 Price, 272.



Apportion-  
ment of Costs.

Where no part  
of bill is dis-  
missed.

Where spe-  
cific perform-  
ance decreed.

In matters of  
account.

Where bill is  
totally dis-  
missed.

Costs of one  
party will be  
set off against  
the costs and  
duty of an-  
other.

Sometimes, where no part of the bill is dismissed, but a decree is made upon the whole of it, the Court will order the costs of the suit, up to a certain period, to be borne by one party, and the remainder by another. Thus, in suits for specific performance, where a vendor does not make out his title until after the bill is filed, he will be liable to pay the costs of the suit, up to the time when he showed a good title (*f*).

And so where the vendor established his title before the Master, after a contest, upon a different ground from that in the abstract delivered, the Court decreed the costs of the references upon the title, and of the several applications which were made to the Court, to the purchaser (*g*).

In matters of account, also, the Court will frequently apportion the costs between the plaintiff and defendant. Thus, where a plaintiff took a decree for an account against an executor, who had in his answer stated an account, which was found by the Master to be correct, the Court gave the costs of the suit up to the decree to the plaintiff, and the costs of the subsequent proceedings to the defendant—the reason of the distinction, apparently, being, that the executor had, before the bill was filed, been applied to for an account, but gave none (*h*), and so had rendered the suit necessary; but it was at the plaintiff's own risk that he proceeded with it, after the defendant had rendered a correct account by his answer.

In like manner, where a bill is totally dismissed, the Court will sometimes apportion the costs to be paid by the plaintiff, as in the case of *Bruce v. Bainbridge* (*i*), where a bill was filed by a seller, for a specific performance of the contract for sale, and the Master's report was in favor of the title; a case was sent to the C. P., and the certificate being against the title, the bill was dismissed with costs, only from the date of the Master's report.

It may be mentioned, in this place, that where, in a cause, the costs are apportioned between the plaintiffs and the defendants, the Court will generally so arrange them, that they may be set off one against the other, and that the balance only shall be paid by the party, from whom, upon setting off such costs, it shall appear to

(*f*) Vide ante, p. 1091; 3 Sugd. V. & P. (ed. 1840), 140, pl. 13, ib. 143, pl. 23; and vide *Townsend v. Champenowne*, 3 Y. & C. 505, Exch. Rep.; *Harford v. Purrier*, 1 Mad. 539; *Wilson v. Allen*, 1 J. & W. 623; *Wynn v. Morgan*, 7 Ves. 202;

*Collinge's case*, 3 V. & B. 143, n.; *Lewin v. Guest*, 1 Russ. 328.

(*g*) *Fielder v. Higginson*, 3 V. & B. 140.

(*h*) *Anon.* 4 Mad. 273, et vide *Beames on Costs* (ed. 1840), p. 7.

(*i*) 3 Sugd. V. & P. 140.

be due (1). The Court will, also, where there are sums of money to be paid, as well as costs, arrange the demands of each, so as to do justice to all (k). Thus, in *Fell v. Lutwidge* (l), where the costs of the suit were thrown upon a trustee, on the ground of fraud, Lord Hardwicke allowed him to set off those costs against the premiums, and other charges he had been at in obtaining a policy of insurance (2).

Apportionment of Costs

So, in a suit in the administration of assets, in which, according to the common course of the Court, all the parties are entitled to have their costs out of the fund, a party who was a debtor to the estate, was not allowed to receive payment of them, whilst his debt remained unsatisfied; but the costs due to him were ordered to be set off, *pro tanto*, against the debt due from him (m).

Costs due to debtor to the estate, set off against his debt.

The same principle was acted upon by Lord Manners, in *Shine v. Gough* (n); in that case, the plaintiff had been compelled to resort to a Court of Equity, to be quieted in his possession against the defendant, who had brought an action of ejectment and obtained judgment, and the plaintiff in Equity obtained a decree to be quieted in his possession, with costs; but the decree having omitted to give him liberty to set off the costs in Equity, against the costs at Law, his Lordship made an order authorizing him to do so.

Set-off of costs.

It is to be remarked, that the application was made to the Court by motion; it was admitted, however, that the order ought to have made part of the decree, and that the omission could, strictly speaking, only be supplied upon a re-hearing; but as the form of the application does not appear to have been objected to, and the only point raised was, whether the solicitor's lien upon the costs of the suit, was not a reason for refusing the set-off required, (which the Court was of opinion it was not,) the Court granted the motion; in order to save the plaintiff the delay and expense of a re-hearing. But in *Rumney v. Beal* (o), where an application, by motion, was made on the part of the defendant, for a special direction to the Deputy Remembrancer, requiring him, in his taxation of the costs of the parties under the decree, to deduct the costs which he should allow the plaintiff, the motion was refused. It appeared that the suit had been instituted for an ac-

Not ordered on motion.

(k) *Taylor v. Popham*, 15 Ves. 72. (n) 2 V. & B. 33.  
(l) *Barnard*. 319. (o) 10 Pri. 113.  
(m) *Harmer v. Harris*, 1 Russ. 155.

(1) See *Richards v. Barlow*, 1 Paige, 323; *Norton v. Woods*, 5 Paige, 260; *Simpson v. Brewster*, 9 Paige, 245.  
(2) See *Battle v. Griffin*, 5 Pick. 167.

Set-off of Costs count of tithes, to some of which the plaintiff was held entitled, and to some not. The Deputy Remembrancer was to take an account and to tax the plaintiff's costs, in respect of those matters to which he was held entitled, which costs, when taxed, were to be paid by the defendant; and the bill as to the other matters, was dismissed with costs, to be taxed and paid by the plaintiff to the defendant. The plaintiff's costs were taxed at 600*l.*; and those of the defendant which they sought to set off against them, at about 60*l.*; and the present application was made, in consequence of the plaintiff having become insolvent. It is not stated in the report, upon what grounds the Court refused the motion (*p*); but it may be assumed, that they were those suggested at the bar, and which are in unison with the doubts which suggested themselves to Lord Manners, in *Shine v. Gough* (*q*), and, as the author submits, to the strict practice of the Court, viz., that no such set-off had been directed by the decree, and that the application should have been made before the decree was passed and acted upon.

Whether costs in one suit set-off against costs or duty in another suit.

It is to be observed that, in the above cases, the costs and the duty were respecting matters in the same suit. Some doubt has, however, arisen as to whether the Court will set off costs of one suit, against the costs or costs and duty due to the party to pay them, from the person who is to receive them in another.

In Courts of Law, it seems, that parties are allowed to deduct or set off the costs, or the debt and costs in one action, against those in another, and that, not only where the parties are the same, but also where they are in some measure distinct, as where one of the demands for costs has been separate, and the others joint (*r*); and the rule has also been applied to cases in which the costs required to be set off have been incurred in a suit in Equity (*s*). But this rule, though it proceeds upon equitable grounds (*t*), and has been approved of by Lord Hardwicke (*u*), does not appear ever to have been adopted by Courts of Equity.

(*p*) Beames on Costs, (ed. 1840), p. 137.

(*q*) Ubi supra.

(*r*) Vide Tidd. 9th ed. 991. This practice does not seem to have obtained, till lately, in the Court of Queen's Bench, and that Court will not, in general, suffer the debt and costs in one action, to be set off against those in another, until the attorney's bill is first discharged, although, in the Common Pleas, the

attorney's lien for costs is holden to be subject to the equitable claims that exist between the parties in the cause, *ibid.* 992; and vide *Taylor v. Popham*, 15 Ves. 72.

(*s*) Vide *Webber v. Nocolas*, 4 Bing. 16; vide etiam, *Shergold v. Brewster*, Bunb. 29.

(*t*) Hullock on Costs, 991.

(*u*) *Gurish v. Donovan*, 2 Atk. 165; *Barnard*. 428.

The case of *Shergold v. Brewster* (x), has, however, been referred to, by a learned writer upon the subject of costs, as an instance in which the Court of Exchequer acted upon the principle it involves (y); but it is to be recollected, that the Court of Exchequer was a Court of Law, as well as of Equity, and that the application, in that case, might have been made to it in that character. The same observation will also apply to *Gifford v. Gifford* (z), and *Smith v. Brocklesby* (a), which have been referred to as tacitly conceding that as the solicitor's lien had not intervened, the costs at Law might have been set off against the costs in Equity; and it is to be noticed, that in a case cited by the same learned author (b), where the application appears to have been made, expressly, to the equitable branch of its jurisdiction, the same Court refused the application (c).

But, whatever the practice of the Court of Exchequer, in cases of this description, may have been, there can be no doubt that it is not the practice of the Court of Chancery to allow the costs or duty due from a party in a proceeding in another Court, to be set off against the costs due to that party, in respect of proceedings in Chancery (c).

Where a party is entitled to costs, he should take care and apply for them at the hearing, or at any rate before the decree has been passed — as, after a decree has been passed, the Court will not, on petition, give the costs of the suit to a party, although he was a mere trustee, and as such would have been entitled to them, as a matter of course, if asked for at the hearing (e). Where, however, a trustee did not appear at the hearing, and consequently a decree *nisi* was made against him, without making any provision as to his costs, whereupon he set the cause down again, upon payment of the costs of the day, Lord Kenyon said, the payment of the costs of the day, made the trustee "*rectum in curia*," and as he would most unquestionably have been entitled

Set-off of Costs

Application for costs should be made at hearing.

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|--|---|
| (x) <i>Ubi supra</i> .                         | (c) <i>Gabet v. Chater</i> , ib. & vide Appx. No. 13.   |
| (y) <i>Beames on Costs</i> (ed. 1840), p. 137. | (d) <i>Wright v. Mudie</i> , 1 S. & S. 266; and vide <i>Holworthy v. Mortlock</i> , 1 Cox, 202; 2 Bro. C. C. 17 S. C. |
| (z) <i>Forrest</i> , 109.                      | (e) <i>Colman v. Sarell</i> , 2 Cox, 206.   |
| (a) 1 <i>Anst.</i> 61.                         |   |
| (b) <i>Beames on Costs</i> (ed. 1840), p. 139. |   |

Of Trustees, to his costs, if he had appeared at the original hearing, so he now  
 Personal Rep- stood in the same situation, and was therefore entitled to receive  
 resentatives, them (f).  
 &c.

## SECTION III.

*Of Costs out of the Fund.*

In what cases payment of costs will be ordered out of the fund, In the last section, an attempt has been made to point out some of the principles by which the Court is governed in awarding the costs of a suit, in cases in which the subject of litigation, not being a fund or estate under the administration of the Court, the costs must necessarily be taken out of the pocket of one party, to be paid into that of another. We shall now proceed to the consideration of those cases, in which an estate, whether real or personal, being the subject of litigation, the Court will order the costs of the suit, or those of some of the parties to it, to be defrayed out of the fund or estate (1).

in the case of trustees, agents and receivers; and of personal representatives, It is a rule, that trustees, agents, and receivers, accounting fairly, and paying their money into Court, are entitled to their costs out of the estate, as a matter of course (h); and the same rule extends to personal representatives (i) (2), with regard to whom, as the decisions of the Court show, that they can only obtain complete exoneration, by having their accounts passed in this Court (k), the Court will give them every opportunity of exonerating themselves by passing their accounts at the expense of the estate.

whether plaintiffs or defendants; This rule is not confined to cases in which they are brought before the Court as defendants; it is a general principle, that a trustee has a right to the protection of the Court, in the execution of his trust; he is therefore entitled to his costs, whether he comes before the Court as plaintiff or defendant, unless the act required to be done leads to no responsibility, or his motive is obviously vexatious (l) (3). And a trustee fairly instituting a suit for the

(f) *Norris v. Norris*, 1 Cox, 183. 105; *Samuel v. Jones*, 2 Hare, 246.  
 (h) *Attorney-gen. v. The City of London*, 1 Ves. J. 246; 3 Bro. C. 3 M. & C. 122.  
 (i) *Curteis v. Candler, Mad. & Geld.* 123.  
 (l) *Rashley v. Masters*, 1 Ves. J.

(1) See *Peck v. Stedman*, 20 Pick. 312, 321.

(2) *Decker v. Miller*, 2 Paige, 149; *Knox v. Picket*, 4 Desaus. 199.

(3) *Hosack v. Rogers*, 9 Paige, 461.

direction of the Court, with regard to the trust, will not only be entitled to his own costs, but any person made a party to the suit, for his protection, will also be ordered his costs from the fund; thus, where a bill was filed by trustees, for the direction of the Court, as to the application of a trust fund, in the course of which a dispute arose between the two defendants, whether one of them was illegitimate, and the Master found that he was legitimate, — the other was allowed his costs out of the trust fund (*m*). “Where,” says Lord Hardwicke (*n*), “a trustee is merely a trustee, and there is any act to be done by him, it is very commendable in him to be cautious; and the Court will consider him entitled to its protection and direction in the execution of his trusts, and will not only never call upon him to pay the costs, unless he refuses to act without suit, or merely from caprice or obstinacy, but will give him his costs out of the trust property, although it appears, in the result, that he might safely have acted without suit.” The same doctrine has been held in a recent case (*o*); and in another case (*p*), Lord Langdale, M. R., says: I cannot conceive that any thing could be more hard than that executors who are called in to administer estates, where there are doubtful questions arising on the will, and who can be exonerated only by having their accounts passed in a Court of Equity (*q*), should be deterred from coming to this Court, by being visited with the costs of the proceedings (*l*).

Of Trustees,  
Personal Rep-  
resentatives.  
&c.

Where, however, the act required to be done by a trustee, leads to no responsibility, or his motive is obviously vexatious, he will not be allowed his costs: thus, where trustees under a will refused to pay a legacy to the assignees of a bankrupt, merely because the bankrupt himself had set up a claim to it, Sir J. Leach, M. R., refused them their costs of the suit, because the case was too clear to admit of a doubt; but, as they might have acted from mere ignorance, and not from any improper motive, the Master of the Rolls, although he deprived them of their own costs, would not make them pay the costs of the plaintiff (*r*).

Refused their  
costs where  
the act leads  
to no responsi-  
bility, and mo-  
tive is vexa-  
tious,

- (*m*) Hicks v. Wrench, Mad. & Geld. 93.      (*p*) Low v. Carter, 1 Beavan, 427.  
(*n*) Henley v. Philips, 2 Atk. 48.      (*q*) Vide Knatchbull v. Fearnhead, 3 M. & C. 122.  
(*o*) Vide Taylor v. Glanville, 3 Mad. 176.      (*r*) Knight v. Martin, 1 R. & M. 70.

(1) Knox v. Picket, 4 Desaus. 199; Morrell v. Dickey, 1 John. Ch. 153; Moses v. Murgatroyd, 1 John. Ch. 473; Dunscomb v. Dunscomb, 1 John. Ch. 508; Goodrich v. Pendleton, 3 John. Ch. 520; Warden v. Burts, 2 M'Cord Ch. 76; Wright v. Wright, 2 M'Cord Ch. 191; Delafield v. Colden, 1 Paige, 139; Fritchard v. Hicks, 1 Paige, 270; Hosack v. Rogers, 9 Paige, 461; Armstrong v. Zane, 12 Ohio, 287.

Of Trustees,  
Personal Rep-  
resentatives,  
&c.

or where they  
act from  
caprice or ob-  
stinacy.

They must  
not unneces-  
sarily burthen  
fund with  
costs;

— therefore  
trustee who  
has not acted,  
must not put  
in a full an-  
swer.

Where execu-  
tor plaintiff,  
unnecessarily  
makes co-exe-  
cutor defen-  
dant.

Trustees, &c.  
may make a  
claim for their  
own benefit;  
but must not  
compel *cestui  
qui trust* to  
come into  
Court, merely  
for their own  
benefit,

So, where a trustee, from caprice or obstinacy, occasions a suit which would otherwise be unnecessary, he will not be allowed the costs of it, whether he appear in such suit in the character of defendant or of plaintiff; thus, where a person having in his hands a sum of money belonging to an infant, instituted a suit, to have that sum secured for the benefit of the infant, though there was a trustee of a settlement, to whom it ought to have been paid, and who was willing to receive it, Lord Gifford, M. R., refused to allow him his costs out of the fund (s) (1).

Although trustees, or other persons standing in that character, are, as we have seen, generally held entitled to their costs out of the estate, yet they will not be permitted unnecessarily to burthen the fund, by costs which they might have avoided; thus, although two or more trustees, having a fiduciary character, may, notwithstanding they employ separate solicitors, and put in separate answers, have each his costs (t), yet they will not be allowed to make use of this privilege in an oppressive manner; and, therefore, where a trustee, who had not acted, put in a full answer to the whole bill, an order was made at the hearing, to tax him the costs of such answer only as would have been necessary and proper (u). So where an executor plaintiff, made his co-executor a defendant, the Lord Chancellor, for some time, doubted whether he ought to have his costs, but at length they were ordered to be paid to him (x).

Trustees and personal representatives brought into Court, will not be deprived of their costs, although they make a claim for their own benefit and fail, provided they do so "by way of submission (y) (2)." But where a trustee has a private interest of his own, separate and independent from the trust, and obliges the

(s) *Ellis v. Ellis*, 1 Russ. 368; in general, where a trustee, through his neglect or obstinacy, occasions the suit, he will be ordered to pay the costs of it, vide post.

(t) Vide *Reade v. Sparkes*, 1 Moll. 10; *Aldridge v. Westbrook*, 5 Beav. 212. For the rule as to costs, where

they employ the same solicitor, yet put in separate answers, vide ante, p. 840, and 27th Order of 1828.

(u) *Martin v. Perasse*, 1 Moll. 146.

(x) *Blount v. Burrow*, 3 Bro. C. C. 90.

(y) *Rashley v. Martin*, 1 Ves. J. 205.

(1) Where heirs, executors, or administrators, bring groundless or vexatious suits, they will be ordered to pay costs. *Getman v. Beardsley*, 2 John. Ch. 274.

(2) Thus where an executor, who is indebted to the estate, has a right to ask the aid and protection of the Court in paying over the money due by him, he will be entitled to his costs out of the fund. *Decker v. Miller*, 2 Paige, 149. So if the executor, who was a creditor of the estate, had a right of preference over other creditors, and was compelled to come into Chancery to obtain such preference, his costs will be paid out of the fund. *Ib.*

*cestui qui trust* to come into this Court, merely to hear the point relating to his own private interest, determined at the expense of the trust, this is such vexatious behavior, on his part, that, for example sake, he will be decreed to pay the whole costs of the suit (z) (1). Upon this ground, where on a bill filed for a residue, the defendant, the executor, by his answer stated declarations of the testatrix, that her other relatives should have no more than their express legacies, and hoped to prove that the surplus was intended for himself as executor, he was made to pay the costs for thus insisting upon the surplus (a).

Of Trustees  
Personal Rep-  
resentatives,  
&c.

As the Court will not allow trustees to take advantage of the rule of the Court in their favor, to obtain a determination upon their own rights, so it will not tolerate their attempting to defeat the claims of their *cestui qui trust*, by setting up an improper defence; therefore, where the trustees of an estate, bequeathed to them in trust for a charity, insisted that the plaintiffs, under a clause in the will of the founder, (by which it was declared, that if the heirs at law should dispute the will, they should forfeit certain annuities thereby bequeathed to them,) had forfeited their annuities by filing the bill, and praying that the trust for the charity might be declared a resulting trust, or in the alternative, that they might have the arrears of their annuity, — Lord Talbot ordered them to pay the costs out of their own pockets, and not out of the trust estate (b).

— or at-  
tempt to defea  
*cestui qui*  
trust, by set-  
ting up an im-  
proper de-  
fence.

— or by  
making an im-  
proper claim,

And so, if a trustee sets up a trust different to what it actually is, the Court will deprive him of his costs, although he does it not to benefit himself, but another. Thus, where the defendant, who was the trustee of her daughter's settlement, upon a question between the husband and wife, whether the wife, who was separated from her husband and lived in a state of adultery, was entitled, under the settlement, to the dividends of a sum of stock to her separate use, insisted, contrary to the fact, that it was the intention of the parties, that a provision for the separate use of the wife should be introduced into the settlement, Lord Thurlow thought there was ground to deprive her of her costs (c).

— or statin  
the trust,  
different from  
what it really  
is.

Trustees will, also, be deprived of their costs if they claim more than they are entitled to: therefore, where the trustees of a

When trustee  
claim more  
than they are  
entitled to.

(z) *Henley v. Philips*, 2 Atk. 48. 346; 2 Atk. 148, S. C.  
(a) *Bayly v. Powell*, Prec. in Ch. (c) *Ball v. Montgomery*, 2 Ves. J. 191.  
92; 2 Vern. 361, S. C.  
(b) *Lloyd v. Spillet*, 3 P. Wms.

(1) See post, 1559, note; *Dupont v. Johnson*, 1 Bailey Eq. 279; *Gardner v. Gardner*, 6 Paige, 455; *Hunn v. Norton*, 1 Hopk. 344.



Of Trustees,  
Personal Rep-  
resentatives,  
&c.

Where claim  
is honestly  
made, though  
mistaken.

— where he  
occasions suit  
by neglect or  
misconduct,

— or refusal  
to act after  
having acted,

or commits a  
fraud,

— although  
it is directed  
that he shall  
be reimbursed  
out of the es-  
tate,

— if he im-  
properly retain  
trust-money.

charity insisted, by their answer, that there was 800*l.* due to them from the charity, but the Master reported that 180*l.* only was due to them, Lord Cowper refused them their costs, though the balance was in their favor, "forasmuch as they would have surcharged the charity 620*l.*" (c).

It may be noticed, however, that a disallowance of credit, honestly claimed by an executor, though he is mistaken, is not enough to disentitle him to costs: therefore, where an executor's account was surcharged by the amount of a credit taken for the proportion of an annuity, payable by the testator, during his life, to the executor, but which was not apportionable, the mistake was not considered by Sir A. Hart, L. C., as a ground to deprive the executor of his costs (d).

If a person, standing in the situation of a trustee, by his neglect or misconduct occasions the suit, he will be deprived of his costs out of the estate (e) (1).

So, also, if a trustee, having taken upon himself the trust, afterwards refuses to act, and thereby renders a suit for the appointment of a new trustee necessary, he will be refused his costs (f).

And if an executor commits a fraud, he will not be allowed his costs, though the testator has directed that his executors shall be reimbursed any expenses they may incur out of the property (g).

In like manner if a personal representative or other trustee *improperly* retain trust monies in his hands, he will be deprived of the costs of the suit (h). In order, however, to disentitle him to costs, he must be guilty of some impropriety of conduct, the mere circumstance of his being found in debt to the estate will not be sufficient, even though he may be ordered to pay interest on the balance (i).

(c) *Attorney-general v. The Brewer's Company*, 1 P. Wms. 376; and see *Dawson v. Parrot*, 3 Bro. C. C. 236.

(d) *Bennett v. Going*, 1 Moll. 529.

(e) *O'Callaghan v. Cooper*, 5 Ves. 129; *Thorby v. Yeats*, 1 Y. & C. 438.

(f) *Howard v. Rhodes*, 1 Keen, 581.

(g) *Hide v. Haywood*, 2 Atk. 126.

(h) *Dawson v. Parrot*, 3 Bro. C. C. 236.

(i) *Parrot v. Treby*, Prec. in Ch. 254. It appears, from some cases, to have been considered, that where the Court gives interest against executors or other trustees as a remedy for

a breach of trust, the costs follow of course; vide *Seers v. Hind*, 1 Ves. J. 294; *Roche v. Hart*, 11 Ves. 62; *Mosley v. Ward*, *ibid.* 583; but, in *Ashburnham v. Thompson*, 13 Ves. 404, Sir W. Grant, M. R. in giving costs against executors, whom he charged with interest, went into the circumstances as a ground for it, observing that he did so, seeing the rule laid down in so general a manner in *Seers v. Hind*, to which he was not quite prepared to accede, as there might be cases in which executors must pay interest which would not be cases for costs; vide etiam, *Bennett v. Atkins*, 1 Y. & Col. 250.

(1) Where the necessity for a sale arose from an administrator's ill con-

In *Travers v. Townsend* (*k*), Sir A. Hart, L. C., said he had often heard it stated as a principle, by some of the greatest Judges, that an executor, though in the result made answerable for default, by reason of loss incurred through his neglect, or charged with interest for retaining money in his hands, yet, if there was nothing beyond such negligence, or retention of money, against him, was still entitled to the costs of the suit.

Of Trustees  
Personal Representatives  
&c.

When entitled  
to costs;

So also, although, in general, a trustee committing a breach of trust, which may render an application to this Court necessary, will be deprived of his costs, yet, where the breach of trust consisted of the improper application of a small part of the trust fund, which was promptly offered to be restored, and the suit was for other purposes of the trust, there being no imputation against the trustee, he was held not to be disentitled to his costs (*l*).

And where a suit was instituted against an executor and trustee, with unnecessary haste, without any previous application for the account, or for payment of the balance, Lord Abinger, C. B., although a small balance appeared due from him, allowed him to retain the amount of his costs out of it (*m*).

— not refused where  
suit instituted  
with unnecessary  
haste.

In most of the cases above referred to, the Court has contented itself with marking its disapprobation of the conduct of the trustee or personal representative, by withholding from him his costs, to which he would otherwise have been entitled out of fund; it frequently, however, happens that the Court will go further, and will not only deprive the trustee or representative of his costs, but will compel him to pay the costs of the suit out of his own pocket; and it may be stated, as a general rule, that, if any particular instance of misconduct or a general dereliction of duty in a trustee, is the immediate cause of a suit being instituted, the trustee, on the charge being substantiated against him, must pay the costs of the proceedings his own improper behavior has occasioned (*n*) (*1*). Upon this principle, where an executor, directed to lay

In what cases  
trustee will be  
ordered to pay  
costs.

Wherever suit  
has been occasioned  
by his misconduct or  
dereliction of  
duty.

Where he has  
unnecessarily  
kept large balances  
in his hands.

(*k*) 1 Moll. 496; vide etiam, *Flanagan v. Nolan*, ib. 84.

(*l*) *Fitzgerald v. Pringle*, 2 Moll. 534.

(*m*) *Bennett v. Atkins*, 1 Y. & C. 249, Exch. Rep.

(*n*) *Lewin on Trustees*, p. 452. This rule applies also where corporations are trustees for charities; vide *Attorney-general v. Hobert*, Rep. t. Finch, 259; *Haberdashers' Comp. v. Attorney-general*, 2 Bro. P. C. 370.

duct, he was held responsible for the costs. *Blevins v. Simpson*, 2 B. Monroe, 463, 464.

(1) *Blevins v. Simpson*, 2 B. Monroe, 463, 464, cited next note above. Where executors litigate their own private interests, they will be ordered to pay costs. *Dupont v. Johnson*, 1 Bailey Eq. 279. See *Gardner v. Gardner*, 6 Paige, 455; *Hunn v. Norton*, 1 Hopk. 344.

Of Trustees,  
Personal Rep-  
resentatives,  
&c.

When they  
have to pay  
costs.

When they  
have made  
an unfair ap-  
praisement,  
or kept posses-  
sion of the  
estate.

although mo-  
tive has not  
been corrupt.

Where they  
have acted  
from caprice  
or obstinacy.

— or have  
occasioned suit  
by a breach of  
trust,

— by paying  
over estate,  
settled to  
wife's separate  
use, to hus-  
band,

out the testator's personalty in the funds, unnecessarily kept large balances in his hands and resisted the payment of debts, by false pretences of outstanding demands, he was charged with the costs (*o*). And where an executor retained a balance in his hands longer than was necessary to answer contingencies, he was ordered to pay interest and costs, although it appeared that he always kept a sum ready at his bankers to defray the amount (*p*).

And where an executor obtained from a legatee a release from a legacy for which no consideration was given, he was ordered to pay the costs of the suit instituted to set aside such release (*q*).

It has also been held, that if executors make an unfair appraisement, and otherwise misbehave themselves in their trust, they will be liable to costs (*r*). And where trustees kept possession of an estate from their *cestui qui trust*, whom they considered a lunatic, (but who, although eccentric when he was drunk, was not insane,) upon a bill filed by the supposed lunatic, they were ordered to pay the costs of the suit, although it did not appear that they had acted from any corrupt motive, but were merely, as they considered, protecting the property for the benefit of those in remainder (*s*). Indeed, it seems that, in general, although his motive may not have been corrupt, if a trustee, by his improper conduct, occasions a suit, the Court will fix him with the costs (*t*). Thus if he refuses to act, from caprice or obstinacy, "it would be against the interests of society to hold that he should not be fixed with the costs occasioned by it" (*u*).

So also, where the suit has been occasioned by a breach of trust, the trustees will be compelled to pay the costs; thus where trustees, with the privity of the wife, sold out stock which had been settled to her separate use, and paid the proceeds to the husband, taking his bond of indemnity, and the husband afterwards died insolvent, whereupon the trustees replaced the stock,—upon a bill filed by the widow and children to have the fund secured, the trustees were considered as having caused the suit by their breach of trust, and were ordered to pay the widow the amount

(*o*) Crackelt v. Bethane, 1 Jac. & W. 386; vide etiam, Mosley v. Ward, 11 Ves. 581; Piety v. Stace, 4 Ves. 620; vide n. (*i*), page 1558.

(*p*) Franklin v. Frith, 3 Bro. C. C. 433.

(*q*) Horsley v. Chaloner, 2 Ves. 83.

(*r*) Sheppard v. Smith, 2 Bro. P. C. 372.

(*s*) Brown v. How, Barnard. 354.

(*t*) Vide Caffrey v. Darby, 6 Ves. 488.

(*u*) Vide Taylor v. Glanville, 3 Mad. 178; vide etiam, Jones v. Lewis, 1 Cox, 199; ante, p. 1549; Earl of Scarborough v. Parker, 1 Ves. J. 267.

of the dividends from the husband's death, with the costs of the suit (x). Of Trustees  
Personal Re-  
presentatives,  
&c.

In like manner where a trustee, mistaking his power, sold stock without authority, and, with the produce, purchased land, without having the power to do so, he was ordered to replace the stock and to pay the costs (y). — by sellin  
out stock with  
out authority.

And where the trustee of a legacy, which had been invested in stock, authorized another person, who was supposed to be entitled to the management of it, to sell it out and receive the produce, it was held that the trustee was answerable for the stock, and he was ordered to pay the costs, although the legatee, not knowing that the legacy had ever been invested or sold out, had dealt with the party who sold it out as the person accountable for the money (z).

It seems, that, in order to constitute such misconduct as will induce the Court to visit trustees with costs, it is not necessary that there should have been *misfeasance* on the part of the trustee; simple *nonfeasance*, where it has been productive of mischief to the trust estate, will be sufficient; thus, where the trustees of a charity, although they were not guilty of any corruption, had been extremely negligent in their trust, Lord Chancellor King held, that they ought to be punished with some of the costs (a) (1). So, Trustees lia-  
ble to costs  
without actual  
misfeasance,  
— if there  
has been great  
negligence. also, where an executor omitted to bring an action to recover a bond debt, he was ordered to pay the costs of taking the accounts (b). — where  
they have not  
brought action  
to recover a  
debt.

And where two executors had kept money of their testator in their hands longer than the contingencies of the affairs required, and were consequently ordered to pay the amount with interest, but one was insolvent, the Court ordered each of them to be liable to whole costs (c). — or have  
allowed insol-  
vent co-exe-  
cutor to retain  
money.

In a recent case, where, in consequence of disputes between trustees, as to who should receive the rents of the trust estate, the rents were suffered to get into arrear, and the *cestui que trust* was obliged to file a bill for a receiver, &c., the Master of the Rolls ordered that the costs of the suit should be paid by the trustees. — or by dis-  
putes among  
themselves  
have rendered  
suit necessary

- (x) *Whistler v. Newman*, 4 Ves. The Atty.-Gen., 2 Bro. P. C. 370;  
129. Atty.-gen. v. Hobert, Rep. t. Finch,  
(y) *Earl Powlet v. Herbert*, 1 Ves. 259.  
J. 297. (b) *Lowson v. Copeland*, 2 Bro. C.  
(z) *Adams v. Clifton*, 1 Russ. 297. C. 156, ed. Belt.  
(e) *East v. Ryal*, 2 P. Wms. 284; (c) *Littlehales v. Gascoyne*, 3 Bro.  
vide etiam, *Haberdashers' Comp. v.* C. C. 73.

(1) *Gray v. Thompson*, 1 John. Ch. 82; *Tiernan v. Wilson*, 6 John. Ch. 411; *Knox v. Pickett*, 4 Desaus. 199. See *Black v. Blakeley*, 2 M'Cord Ch. 9; *Sorrel v. Proctor*, 4 Hen. & Munf. 431.

Of Trustees,  
Personal Rep-  
resentatives,  
&c.



Where there  
has been mis-  
conduct in the  
course of the  
cause.

Where they  
have denied  
assets after-  
wards proved  
against them,

— where  
answer falsi-  
fied and mo-  
tive fraudu-  
lent,

— where ev-  
idence con-  
cealed.

Trustee not  
fixed with  
costs where  
motives not  
corrupt and  
no loss has  
been incurred,

It was, however, contended, on behalf of some of the trustees, that they were not to blame, and that the fault lay with the others; and upon that, the Master of the Rolls offered to direct an inquiry, if it should be asked for, as to the circumstances by which the plaintiff had been prevented from receiving her rents, in order that the Court might adjudicate between the defendants in respect of the costs; but the inquiry was declined.

In many cases, also, if there is misconduct on the part of a trustee or personal representative in the course of the cause, the Court will compel him to pay the costs of the suit out of his own pocket. Thus a trustee will be fixed with costs if he wilfully misstate the accounts (*d*), or if, by chicanery in his answer, he keeps the *cestui qui trust* from a true knowledge of the accounts, or even if he has kept the accounts in a very confused manner (*e*). An executor, also, will be liable to costs, if he deny assets and the contrary be proved against him (*f*); though, where he was the executor of an executor, and the estates of the two testators had been so blended as to create confusion, he was excused his costs though it appeared he had assets sufficient to pay the plaintiff's debt (*g*). And wherever the answer of an executor or other trustee is falsified by proof, and he appears to have acted from fraudulent motives, he will be made to pay the costs (*h*). So, if a corporation, being trustees for a charity, suppress or conceal evidence relating to the charity, they will be held liable to the costs of the suit (*i*). And if a trustee, by his answer, set up objections to the performance of his trust, which he does not substantiate, he will be made to pay the costs (*k*).

It is to be remarked, that, although a personal representative, or other trustee, who misconducts himself in his trust, will be liable to pay the costs of the suit, the rule will be qualified where, though the conduct has been irregular, no loss has been incurred to the estate, and his motive has not been corrupt; thus where a trustee had been guilty of a breach of trust by calling in the trust fund, and mixing it with his own money, yet, as no loss was incurred, and the trustee was free from all imputation of fraud, having always been ready to pay the money, Sir Anthony Hart, L. C.,

(*d*) Sheppard v. Smith, 2 Bro. P. C. 372; and vide Flanagan v. Nolan, 1 Moll. 86.

(*e*) Avery v. Osborn, Barnard. 349; Norbury v. Calbeck, 2 Moll. 461.

(*f*) Sandys v. Watson, 2 Atk. 80.

(*g*) Ibid.

(*h*) Vaughan v. Mursdon, Collier's P. C. 175; vide etiam, Mallabar v.

Mallabar, Ca. t. Talbot, 79.

(*i*) Borough of Hertford v. The Poor of Hertford, 2 Bro. P. C. 377; Atty.-gen. v. East Retford, 2 M. & K. 35.

(*k*) Willis v. Hiscox, 4 M. & C. 198; sed vide Low v. Carter, 1 Beav. 426.

confirmed a decree by which the trustee was allowed to have his costs out of the fund (*l*). The case will, however, be different, if any loss has been occasioned to the estate.

Of Trustees  
Personal Rej  
representatives,  
&c.

It has also been held, that a slight instance of misconduct, in one particular point, will not fix a trustee with the costs; thus where, by an order, made by consent several years before, a trustee had been ordered to pay 200*l*. into Court, but had not done it, and, as an excuse for his disobedience, alleged that the plaintiffs did not serve him with the order, or take any step to have it executed, and that he understood they were dissatisfied with it, and intended to try to have it varied: the Court charged him with interest on the 200*l*. "for the sake of the precedent; because, when an order is made by consent for a sum of money to be paid into Court, no man can dispense with it—either upon the tacit acquiescence of the other side or upon an idea of his own," but, because this was misconduct in a single article of small value, and the Court had fixed a mark of sufficient reprobation upon that single article, it was of opinion that this was not a case to deprive the defendant of his costs, and that he was within the common case of a trustee who is entitled to his costs, to be retained out of the money in his hands (*m*).

or where ther  
has been only  
a slight in-  
stance of mis-  
conduct.

In *Hall v. Hallet* (*n*), Lord Thurlow said that the rule, that executors are to be exempt from paying costs, holds "even in cases where great delays and difficulties have been occasioned by the executor, for the Court will overlook these circumstances if it can." And it is to be observed, that, although an executor or other trustee who grossly misconducts himself in the execution of his trust, will be made to pay the costs occasioned by his misconduct, it does not therefore follow that he must, in all cases, pay the costs of the whole suit. "If a suit would have been proper and the executor or trustee a necessary party, though he had not misconducted himself, he will not be compelled to pay all the costs of such suit, though in the course of the suit it should appear that he has misconducted himself." Thus, where a suit was necessary to determine what construction was to be given to a will, — whether the residue was to be divided between nine or between six claimants, and, in the course of the suit, it appeared that the executors had improperly permitted rents to be in arrear, and retained balances in their hands, as to which inquiries were directed, and they were

Exempt from  
costs, even  
though they  
have created  
delays and  
difficulties.

Or made only  
liable to costs  
of part of the  
suit.

— if suit  
was necessary  
for other pur-  
poses,

(*l*) Vide *Caffrey v. Darby*, 6 Ves. gle, 2 Moll. 534.

(*n*) 1 Cox, 134, 141; vide etiam,

(*m*) *Sammes v. Rickman*, 2 Ves. Bennett v. Atkins, 1 Y. & C. 247.  
1.36; vide etiam, *Fitzgerald v. Prin-*

Of Trustees,  
Personal Rep-  
resentatives,  
&c.



— or Court  
will make no  
order as to  
costs.

Trustees not  
liable to costs  
where suit  
occasioned by  
mistake.

or where con-  
duct not wilful  
nor perverse.

Trustees not  
entitled to  
costs as be-  
tween them-  
selves and  
strangers,

charged with interest, the Master of the Rolls gave the executors the costs of the suit out of the fund, except only the costs of the inquiries as to the arrears of rent and balances, which, being solely occasioned by their breach of trust, he directed to fall upon them (*o*). So where trustees for sale purchased the trust estate at an undervalue, though without fraud and by auction, relief, as to a resale, was given against them with costs, but as to other parts of the case, *i. e.*, as to accounts which must have been taken, they were allowed their costs, as they would have been entitled to them in the ordinary way (*p*).

In such cases the Court, frequently, instead of giving any direction with regard to costs, will content itself with making no order upon the subject, thereby leaving it to each party to pay his own costs (*q*), thus where a trustee, instead of accumulating a fund, as directed by the will, had improperly kept the balance in his hands, yet, as the costs of the suit had in a great measure been occasioned by inquiring what rule the Court ought to adopt with respect to the computation of interest, it was thought hard, under the circumstances, to fix the executor with costs, even relatively to the breach of trust, and, therefore, the Court gave no costs (*r*).

If a suit has been occasioned by the mistake or some slight neglect of the trustee, the Court will content itself with not giving him costs (*s*); and, in some cases, where the conduct of trustees has not been wilful or perverse, the Court has permitted them to have them, although there has been loss to the estate (*t*); thus, where trustees, who were directed to sell an estate as soon as conveniently might be after their testator's death, refused, by the desire of one of the parties interested, 6,000*l.* for the estate and afterwards sold it for 3,600*l.*, the Court, although it charged them with the loss, gave them their costs, as their conduct had not been wilful nor perverse (*u*).

When it is said that personal representatives and others bearing the character of trustees, are entitled to their costs out of the fund or estate which is the subject of the suit, the rule must be understood as applying strictly between themselves and their *cestui qui trusts*; in suits between them and those who are strangers to the

(*o*) *Tebbs v. Carpenter*, 1 Mad. 296.

(*p*) *Sanderson v. Walker*, 13 Ves. 601; vide etiam, *Pocock v. Reddington*, 5 Ves. 800.

(*q*) *Newton v. Bennet*, 1 Bro. C. C. 362.

(*r*) *Raphael v. Boehm*, 13 Ves. 592.

(*s*) *O'Callaghan v. Cooper*, 5 Ves.

117.

(*t*) *Taylor v. Tabrum*, 6 Sim. 281; and vide *Flanagan v. Nolan*, 1 Moll.

84.

(*u*) *Travers v. Townsend*, ib. 496.

trust, the ordinary rule that *victus victori in expensis condemnatus est* prevails (z), though if a trustee or personal representative institutes or defends a suit in respect of his trust estate, he may reimburse himself, out of that estate, any sums he may have expended properly in such suit.

Of Trustees  
Personal Re-  
presentatives  
&c.

Thus, where a trustee for sale, filed a bill for a specific performance, which was dismissed, it was dismissed with costs, the defendant being considered as having nothing to do with the character in which the plaintiff sued (y).

e. g., trustees  
for sale are  
liable to costs

Costs also are given against assignees personally, and not *qua assignees*; they are to pay them, and then may be allowed to draw them out of the estate; but the opposite party is not to be exposed to the hazard, whether the estate is capable of bearing the costs or not; if it be not, it is the misfortune of the assignees (z).

— or assign-  
ees.

So also, an executor plaintiff cannot be distinguished, with respect to costs, from the party whom he represents (a): and if he revive a suit in which his testator was a party, he will incur his testator's liability to costs. Thus, where an executor, after a bill by his testator had been dismissed with costs, revived the suit, alleging that he intended to appeal, he was ordered to pay the costs of the whole suit (b).

Executors,  
&c., liable to  
costs in suits  
with strangers

Upon the same principle, it is the practice of the Court, when a bill is filed against an executor or administrator, by a creditor of the deceased, and the creditor succeeds in establishing his demand, to direct the payment of the amount due to the creditor, together with his costs, out of the assets (c); but it makes no

— in suits  
by creditors of  
deceased, no  
order made as  
to executor's  
costs,

(z) Ante, p. 1521.

(y) *Edwards v. Harvey*, Cooper, 40.

(z) *Poole v. Franks*, 1 Moll. 78. Where assignees are made parties to a suit, it is not usual, nor necessary, to direct their costs out of the bankrupt's estate; for they may charge them in their accounts, unless there are any special reasons to the contrary; for this would be to charge an estate which is not adversely represented before the Court. In bankruptcy, costs are given out of the estate, because there the Court has jurisdiction over it. *Ryan v. Anderson*, V. C. May, 1819; 2 Mad. Prin. & Prac. (ed. 1837), p. 897-8. And see ante, p. 811, as to costs of assignees in foreclosure suits.

(a) *Westley v. Williamson*, 2 Moll. 458.

(b) *Hortock v. Priestley*, 8 Sim. 621; *Lyon v. M'Kenna*, 2 Moll. 460.

(c) Courts of Law, in giving judgment in favor of a creditor, direct the costs to be paid by the executor, *de bonis testatoris*, and if there be none, *de bonis propriis*; in Equity, however, the rule is different, for if the assets be not sufficient to pay both debt and costs, the executor will not be decreed to pay costs (*Uvedale v. Uvedale*, 3 Atk. 119; *Twistleton v. Thelwel*, Hardr. 165); unless he has misconducted himself, by having satisfied simple contracts in preference to debts upon specialty, vide *Jefferies v. Harrison*, 1 Atk. 468. It may be suggested here, that, as an admission of assets by a representative is considered to be an admission of assets sufficient to pay costs as well as the principal demand (*Philanthropic Society v. Hobson*, 2 M. & K. 357), such admission should not be made, unless the party is satisfied that the assets will cover debt and costs.



Of Trustees,  
Personal Rep-  
resentatives,  
&c.

— even  
though it ap-  
pears that  
estate is ex-  
hausted.

Nor will he be  
entitled to  
costs out of  
real estate.

Not allowed  
costs out of  
real estate, al-  
though there is  
no personal es-  
tate.

If executor  
who has not  
proved is made  
party, his  
costs must be  
paid by plain-  
tiff.

order with regard to the payment of the costs of the personal representative. In omitting this, the Court proceeds upon the supposition that the representative may reimburse himself any charges or expenses he may have been at, in the account of the testator's or intestate's estate, which is always kept by executors or administrators; so that if there be no further fund out of which he may reimburse himself, the costs will of course come out of his own pocket (*d*); and even if it should appear, from the Master's report in the cause, that the assets are already exhausted, and that there is no fund out of which the personal representative may reimburse himself, still the Court will not give any directions with regard to his costs, "for there may be more assets than appear by the Master's report, for the plaintiffs might content themselves to prove sufficient to answer their demands (*e*);" besides which, it is stated to be a settled rule, "that the executors of an insolvent shall not have their costs, as they need not have administered (*f*)."  
And it is to be observed, that even though a specialty creditor should sweep away the whole personal estate, this Court will not let the executor reimburse himself his costs out of the real estate of the debtor (*g*).

So, where a bill was filed for the purpose of raising legacies charged on real estate, there being no personal estate, it was held, that the executor taking out probate in such a case, could get no costs (*h*); the rule is the same in the case of the executor of an insolvent mortgagor (*i*). The case is, however, said to be different with respect to an administrator *ad litem*, who will be entitled to his costs out of the fund (*k*), or if that is deficient, from the plaintiff.

If an executor, who has neither proved nor acted, although he has not renounced, is made a party to a suit, for the purpose of raising charges by the sale of real estate, the personal estate being insufficient, the costs of such executor cannot be paid out of the fund, but must be borne by the plaintiff, as he was not a necessary party (*l*).

(*d*) *Humphrys v. Moore*, 2 Atk. 108.

(*e*) *Vide Davy v. Seys*, Mos. 204.

(*f*) *Per Lord Redesdale*, in *Adair v. Shaw*, 1 Sch. & Lef. 280.

(*g*) *Uvedale v. Uvedale*, 3 Atk. 117.

In this respect, there is a material difference between an heir at law and personal representatives, because they may renounce, "but it is the law which casts the descent upon the heir;" the heir, therefore, will be en-

titled to his costs out of the fund raised by sale of the estate, although such fund may not be sufficient to discharge the whole of the claims upon it. *Humphreys v. Morse*, 2 Atk. 408.

(*h*) *Nash v. Dillon*, 1 Moll. 236.

(*i*) *Nicholson v. Falkiner*, *ibid.* 555.

(*k*) *Ibid.*

(*l*) *Nicholson v. Falkiner*, *ubi supra*.

The rule, which has been laid down above (m), that in suits by a creditor against a personal representative, the Court makes no order with regard to the payment of the representative's costs, proceeds, as has been stated, upon the principle, that the personal representative may reimburse himself those costs out of the personal estate, and applies only to suits by individual creditors for their own demands. Where the suit is instituted either by creditors or by legatees, for a general administration of assets, so that the whole estate of the deceased must necessarily come under the direction of the Court, the practice is different, and the costs of the personal representatives are always provided for; and even where there is a deficiency of assets, to pay the whole of the testator's debts, they constitute the first charge upon the fund arising from the personal estate (n). The right of the personal representative to his costs, in such cases, may be defeated by his collusion, or by some of those circumstances which have been already pointed out, as disentitling a trustee from his right to the costs out of the fund: but where there are no circumstances of that nature, the costs of the personal representative constitute the primary charge (1).

In Suits for the Administration of Assets.  
Rule in suits for the administration of assets.

Costs of personal representatives constitute primary charge.

It may be noticed, in this place, that it appears to have been considered, formerly, that a creditor filing a bill was not entitled to have his costs out of the fund, unless there was enough to pay prior demands upon the estate; but now the practice is, when a suit has been fairly instituted for the administration of assets, that the first payment, after the payment of the costs of the executor who has not disentitled himself to costs, should be the costs incurred by the plaintiff in the suit (p). This is stated, by Sir Anthony Hart, L. C. (q), to have been the rule of the Court of Chancery in England for at least thirty years; but it appears to have been shaken by the determination of Sir J. Leach, M. R., in *Young v. Everest* (r), and *Rowlands v. Tucker* (s), who held, that where a simple contract creditor filed a bill, and it appeared that there was

The plaintiff in a creditor's suit entitled his costs;

Even though a simple contract creditor and the fund exhausted by specialty debts.

(m) Ante, p. 1560.

(n) *Bennett v. Going*, 1 Moll. 529;  
*Young v. Everest*, 1 R. & M. 426.

(p) *Bennett v. Going*, ubi supra.

(q) Ibid.

(r) 1 R. & M. 426.

(s) Ibid. 635.

(1) Although a plaintiff is entitled to file his bill for an account and distribution, yet where all the charges of fraud, collusion, and misconduct on the part of the defendants, which formed the main ground of the suit, were proved to be false, unjust and vexatious, the bill was dismissed with costs, as to the defendants not liable to account, and the defendant who was accountable as trustee, was allowed all his taxable costs, extra charges and expenses, out of the fund before distribution. *Minuse v. Cox*, 5 John. Ch. 441.

In Suits for the  
Administration  
of Assets.

— *secus*,  
where *puisne*  
creditor files a  
bill, knowing  
that the estate  
is insufficient.

Where credi-  
tor file a bill  
knowing the  
estate to be  
insolvent.

a specialty creditor, whose demand would exhaust the whole of the assets, the executor might have his costs out of the assets, but not the plaintiff (*t*). In a more recent case, however, Sir C. Pepys, M. R., disapproved of this departure from the ancient rule, and said, "It was contrary to reason, and the uniform practice of this Court, that specialty creditors, who came in to take the benefit of a suit instituted by a simple contract creditor, should throw the burthen of the costs of the suit upon the simple contract creditor, where the assets proved insufficient for the full satisfaction of their claims, and accordingly directed the plaintiffs to be paid their costs out of the fund" (1). In a subsequent case (*u*), his honor adhered to the rule he had laid down in *Larkins v. Paxton* (*x*), and the rule formerly laid down by Sir J. Leach, in *Loomes v. Stot-herd* (*y*), that the costs of the suit are to be considered as expenses of administering the estate, and are the first charge upon the estate, whether administered in or out of Court, is now generally acted upon (*z*).

But although it is the general rule, that, after the payment of the executor's costs, the plaintiff's costs, in a creditor's suit, are to be the first payment out of the fund brought in, such rule is not invariable; and if a *puisne* creditor files a bill on the foot of a debt, which, from the state of the fund, he might have known was probably desperate, the Court will, in all probability, refuse such a plaintiff his costs in the cause (*a*); and where it appeared, upon the Master's report, that there was no fund at all applicable to the payment of the general creditors, the plaintiffs were ordered to pay the costs, except the costs of certain defendants, who, having specific liens upon the only fund brought into Court in the suit, had wholly exhausted that fund (*b*).

It is to be remarked, however, that, in the last-mentioned case, the executor had, by his answer, stated the insolvency of the testator, and that his answer was confirmed by the finding of the Master; but in *Robinson v. Elliot* (*c*), the executrix, although she

(*t*) *Larkins v. Paxton*, 2 M. & K. 320. plaintiffs will be entitled to their costs, as between solicitor and client,

(*u*) *Barker v. Wardle*, *ibid.* 818; vide etiam, *Lechmere v. Brazier*, 1 Russell, 80. As to the costs of creditors coming in under the decree, vide ante, p. 1411. (*y*) 1 S. & S. 458, 460.

(*z*) *Vide Hare v. Rose*, 2 Ves. 558.

(*a*) *Egan v. Baldwin*, 1 Moll. 539.

(*b*) *Bluett v. Jessop*, Jac. 240.

(*c*) 1 Russ. 599.

(1) A creditor, who came in after the Master had filed his report, and obtained leave to prove his debt, without stipulating to contribute to the costs of the suit brought by other creditors against the executors — the assets not being sufficient to pay all the debts proved — was not allowed his costs out of the fund. *Mason v. Codwise*, 6 John. Ch. 183.

had represented that her testator was insolvent, which was true, yet, as she was charged with more than she had admitted by her answer, the bill, as against her, was dismissed without costs. In Suits for the Administration of Assets

It may be observed, in this place, that in suits by *puisne* incumbrancers or general creditors for the administration of assets, it is not usual to make persons having prior specific charges, parties to the suit as they will be untouched by a decree for sale (*d*), and may therefore, if they are made parties, insist upon having the bill, as against them, dismissed with costs. They may, however, waive that right and consent to a sale, and to receive payment of their principal and interest out of the proceeds; in which case, although the decree is for the payment of all parties, according to their priorities, that is to be understood only as to their principal and interest; they must all contribute to the costs of suit, of which they take the advantage, consequently the costs of all parties must in the first instance, come out of the fund (*e*). Where superior incumbrancers consent to sale in a suit by *puisne* creditors, the costs will be paid out of the fund.

The Court acted upon this principle, in *Kenebel v. Scrafton* (*f*), where, in a suit instituted by a first mortgagee, instead of a foreclosure, a sale was directed with the consent of the second and third mortgagees, and the produce not being sufficient to pay them all, the costs were ordered to be paid, in the first instance, out of the fund, although it was objected to by the third mortgagee, whose fund would thereby be proportionately diminished (*1*). So where first mortgagee consents to a sale instead of a foreclosure.

It is to be remarked, that, although a creditor, who files a bill for an administration of assets, will be entitled to his costs out of the fund in Court, such title will not affect the personal representative's right of retainer for satisfaction of a debt due to himself; and even where part of the personal estate had been paid into Court by an administrator, and another part of it remained in his hands, but there was a debt due to him from the intestate, greater than the amount of both funds, and no other assets to satisfy the gen- Right of plaintiff to costs will not deprive executor of his right of retainer for a debt due to himself,

(*d*) Ante, p. 327.

(*e*) *Brace v. The Duchess of Marlborough*, Mos. 50; *White v. The*

*Bishop of Peterborough*, Jac. 402;

*Egan v. Baldwin*, 1 Moll. 539.

(*f*) 13 Ves. 370.

(1) Where a mortgagee brought a bill to foreclose, and subsequent incumbrancers answered and disclaimed as to him, it was held that they were entitled to the costs of their answers, out of the fund, although, as between themselves, they contested the right to the surplus. *Mackie v. Cairns*, 5 Cowen, 547; *Catlin v. Harned*, 3 John. Ch. 61.

Where the widow was necessarily made a party to a bill of foreclosure, she was held entitled to her costs out of two-thirds of the surplus in Court, without prejudice to her claim of dower out of the gross amount of the surplus. *Tabele v. Tabele*, 1 John. Ch. 45.

Where a defendant disclaims he is ordinarily entitled to costs. *Usher v. Jouis*, 5 Litt. 32.

In Suits for the  
Administration  
of Assets.

even though  
fund has been  
paid into  
Court.

But devisee  
cannot retain  
in preference  
to costs,

unless plaintiff  
proceeds after  
notice of  
claim.

Where there is  
a sufficient  
fund, the costs  
must be paid  
out of it,

— though  
the executor  
has offered  
plaintiff a full  
inspection of  
the accounts.

eral body of creditors, or even to pay the costs of the plaintiff,— Sir J. Leach, M. R., was of opinion, that the administrator's right of retainer was not affected by the circumstance of his having paid the money into Court, and that the plaintiff was not entitled to have his costs satisfied out of the fund, to which the right of retainer extended (*g*). But although a personal representative may retain for the amount of his own debt, in preference to the claim of the plaintiff for the costs of the suit, the same thing cannot be done by a devisee of real estates, which are subject to the payment of debts. This rule is laid down in *Loomes v. Stot-herd* (*h*), by Sir J. Leach, who says, "an executor may retain for his own debt, or the debt of his trustee, and therefore a devisee may retain for his own specialty debt, or the debt of his trustee; and if the devisee is also the executor of a deceased creditor, he may retain for his own debt, and next for that of his testator; but the devisee cannot retain his debt in priority to the costs of the suit; because the costs of the suit are to be considered as expenses in administering the estate, and are the first charge upon an estate, whether administered in or out of Court." If, however, a devisee states in his answer, that his right of retainer will exceed the assets, after such notice, the plaintiff may be considered as proceeding at the peril of costs (*i*).

The above rules apply to cases where there is a deficiency in the fund realized by the suit to answer all the claims upon it, but, where the fund is not in that predicament, the general rule is, that, wherever it is necessary to come to the Court, to establish a demand upon the property of persons deceased, the costs of such proceedings must be borne out of the assets (*k*). Therefore, if a bill be filed by a creditor for his debt, or by a legatee for his legacy, the costs of the suit must be paid out of the testator's estate; so also must the costs of a suit, to obtain the benefit of a *donatio mortis causa*. The expenses of a suit also, by residuary legatees, or next of kin, for an account and distribution of an estate, must be defrayed out of the general estate. And it seems that, in such suits, the circumstance that the defendant has offered to the plaintiff a full inspection of his account, makes no difference; a plaintiff, in such a case, is not bound to receive and acquiesce in the mere unsupported statement of the accounting party, he has a right to have the account of the estate taken with the sanction of

(*g*) *Chisum v. Dewes*, 5 Russ. 29.

(*h*) 1 S. & S. 458.

(*i*) *Ibid*.

(*k*) *Vide Hampson v. Brandwood*, 1 Mad. 381, 394; *Gardner v. Parker*, 3 Mad. 184.

oaths, and all other guards against deception which a Court of Equity can supply (*l*). And it appears that the circumstance, that the plaintiff himself, besides being a residuary legatee, is a co-executor with the defendants, will not make any difference in the application of the rule; though, if he files his bill in the character of creditor as well as legatee, and fails in establishing his claim as creditor, he will have to bear any additional costs which may have been occasioned by his unfounded claims (*m*).

In Suits for the Administration of Assets.

Where a bill is brought to secure and have the benefit of a contingent interest devised over, the costs must be paid out of the general assets of the testator, who by his will occasioned the difficulty (*n*); and it is invariably held, that if in the course of a suit for the administration of an estate, a difficulty arises upon the construction of the will, the costs occasioned by such difficulty must be defrayed out of the assets (*o*), even though the difficulty has arisen from parol evidence, introduced on the part of the defendant (*p*). When, however, it is said, that a legatee, filing a bill for his legacy, will be entitled to his costs out of the estate, it must be understood only as applying to those cases in which he is successful in the suit. If a person claims as legatee, and his bill is dismissed, he will not be entitled to his costs out of the testator's estate, notwithstanding there is an ambiguity in the will, which renders it necessary to apply to the Court for its construction (*q*). In such cases, however, the Court will, if the case involves considerable difficulties, occasioned by conflicting decisions and the acts of the testator, make each party bear his own costs, by ordering the dismissal to be without costs (*r*); so it will,

Where suit is to secure a contingent interest, — or is occasioned by a difficulty arising upon the will.

Of suits by legatees, &c.

legatees not entitled to costs where bill dismissed; — but will not be made to pay them, where fair ground of claim

(*l*) *Sharples v. Sharples*, M'Lel. 506; 13 Pri. 745, S. C.

(*m*) *Ibid*.

(*n*) *Studholme v. Hodgson*, 3 P. Wms. 300.

(*o*) This rule applies only to cases arising under wills; it does not apply where difficulties arise upon the construction of deeds, in which cases, although if the deed which gives rise to the suit be so darkly framed as to occasion fair doubts as to its construction, the Court will excuse the unsuccessful parties their costs; it will not compel the successful party to pay them out of the estate. *Hampson v. Brandwood*, ubi supra; vide etiam, *The Earl of Oxford v. Churchill*, 3 V. & B. 59, where the costs of an unsuccessful claim, set up on behalf of an infant to a share of a fund under a settlement, was charged, not

upon the general fund, but upon that portion of the fund to which the infant was held to be entitled.

(*p*) *Nourse v. Finch*, 1 Ves. J. 362.

(*q*) *Lister v. Sheringham*, cited 1 Newl. Pra. 397. In *Wyndham v. Graham*, where the bill was dismissed, Sir J. Copley, M. R., acting on the authority of *Lynn v. Beaver*, Turn. & R. 68, directed the costs of all parties to be paid out of the fund; he does not appear, however, to have adverted to the distinction that, in *Lynn v. Beaver*, there was no actual dismissal, but a declaration of the rights of the parties was made by the decree; besides which, it is to be remarked, that in the decree itself the order as to costs is expressly stated to have been made by consent, *Ibid*. 70.

(*r*) *Cogan v. Stephens*, Lewin on Trustees, Appx. 2, p. 698.

Of Suits by  
Legatees, &c.

~~~~~

Legatees  
refused costs  
where the  
claim is very  
ungracious.

Legatee com-  
ing in under  
decree, to  
have his costs;

—and where  
he stops a suit  
by himself, he  
will have the  
costs of that  
suit.

Out of what  
fund.

also; where the plaintiff has a fair ground for making his claim. Therefore, where a bill was filed, by the next of kin of a testator, against the executors for the residue, and the next of kin failed, the bill was dismissed without costs, because, “when the next of kin are disappointed of the residue, it is some excuse for their litigating the executor’s right to it” (s). And where, after a verdict upon an issue, finding against the legitimacy of a person claiming a legacy as a legitimate child, a question arose as to the costs, the Court refused to give costs against him, as he had always borne the name of the family, and been received in it (t).

It may be noticed here, that in a case where a bill was filed for a legacy, which had been bequeathed to an infant, and which had been more than satisfied by advances made for the infant’s benefit, during his minority, and by a larger legacy bequeathed to the infant by the executor, the Court decreed in favor of the legatee, though there had been no demand for ten years after he came of age; but as it considered the demand very ungracious, it gave the legatee no costs (u).

This, however, can only be considered as an exception to the general rule adopted by the Court, that a legatee filing his bill to recover payment of his legacy, is entitled, if he succeeds, to his costs out of the estate. And here it may be remarked, that if a legatee comes in before the Master under a decree for the administration of assets, and establishes his claim, he will not be deprived of his costs out of the estate. In *Maxwell v. Wettenhall* (x), the same rule was applied to a creditor coming in to prove under such a decree, but, as we have seen, except under particular circumstances, this is not now the practice (y).

Where, however, a legatee, who agreed, after a decree for the administration of an estate in Chancery obtained by another legatee in Chancery, to stop proceedings in a suit previously instituted by him in the Exchequer, he was allowed the costs of his suit in the Exchequer, up to the time of his having notice of the decree in Chancery (z).

It is necessary, here, to advert to an important distinction with regard to the portion of the testator’s estate out of which the costs are to be paid, for the rule is, that where a legacy, either general

(s) *Brasbridge v. Woodroffe*, 2 Atk.

69.

(t) *Forbes v. Taylor*, 1 Ves. J. 99.

(u) *Lee v. Brown*, 4 Ves. 362.

(x) 2 P. Wms. 26.

(y) *Vide ante*, p. 1410–11.

(z) *Jackson v. Leaf*, 1 Jac. & W. 229.

or specific, is to be paid out of the testator's estate, and any doubt or ambiguity arises under the will, which renders an application to the Court necessary, the costs occasioned by such application are to be paid, not out of the legacy or bequest with respect to which the doubt arises, but out of the general assets not otherwise disposed of (*a*) (1); in other words, they are payable out of what is usually termed the residuary estate, although, perhaps, the term may not be quite correct, inasmuch as the residuary estate is, strictly speaking, that part of the estate which remains after payment of all legal and testamentary claims upon the estate, whether for debts, legacies, or costs (*b*).

It may here be observed, that where next of kin, or persons claiming as a class under the will of a testator, succeed in establishing their title under a decree for the administration of the estate, it is usual for them to be allowed their costs;—not their costs incurred out of doors in collecting information as to the pedigree of the party,—not the costs of private inquiry, but the costs incurred in the Master's office, and generally of proceedings in the suit; and the rule prevails, whether they are made parties to the suit by supplemental bill, or whether the fund is administered, without formally bringing them before the Court upon the record (*c*). In such cases, if the residuary estate has ultimately to be divided amongst different classes of persons, the practice is for the costs of all the claimants to be paid out of the general estate before any appointment is made, even though the effect of such a mode of payment is to diminish the fund of one class of claimants to an extent materially greater than the amount of costs due to that particular class (*d*).

Moreover, where the particular fund which has occasioned the litigation is not part of the residue, the general rule is, that the residuary estate should bear the costs of administering the estate.

- (*a*) *Studholme v. Hodgson*, 3 P. Wms. 303; *Jolliffe v. East*, 3 Bro. C. C. 27; *Baugh v. Reed*, ib. 195; 1 Ves. J. 257, S. C.; *Atty.-gen. v. Hurst*, 2 Cox, 365; 3 Bro. C. C. 380, S. C.; sub nom. *Atty.-gen. v. Winchelsea*, *Barrington v. Tristram*, 6 Ves. 249; *Pearson v. Pearson*, 1 Sch. & Lef. 12; *Bagshaw v. Newton*, 9 Mod. 288; *Nisbett v. Murray*, 5 Ves. 158, cum multis alias. (*b*) *Eyre v. Marsden*, 4 M. & C. 231-243; *Ripley v. Moysey*, 1 Keen, 578. (*c*) *Hutchinson v. Freeman*, 4 M. & C. 400. (*d*) *Shuttleworth v. Howarth*, Cr. & P. 223.

(1) Wherever a testator has expressed himself so ambiguously as to make it necessary to go into a Court of Chancery, his general assets must bear the costs. *Jolliffe v. East*, 3 Bro. C. C. (Perkins's ed.) 27; *Sawyer v. Baldwin*, 20 Pick. 328, 389; *Pearson v. Pearson*, 1 Sch. & Lef. 12; *Barrington v. Tristram*, 6 Vesey, 345; *King v. Strong*, 9 Paige, 94; *Smith v. Smith*, 4 Paige, 271; *Rogers v. Ross*, 4 John. Ch. 608.



Out of What  
Fund.

although such  
residue is the  
subject of  
bequest;

— and testa-  
mentary ex-  
penses are  
directed to be  
paid out of a  
particular  
fund.

Where the  
difficulty has  
arisen upon a  
devise of real  
estate,

tate. Thus, where it was necessary to have the decision of the Court, as to whether a legacy of 10,000*l.*, given to two sisters, was a joint bequest or in common, the costs were ordered to be paid, not out of the legacy, but out of the general assets (*e*). So, where a bill was brought to secure and have the benefit of a contingent interest devised over, the costs were ordered to be paid out of the residuary estate; and where the question was, whether a legacy is specific or not, the costs of determining that question have been ordered out of the general estate, in preference to the specific legacy, although the general estate was made the residuary bequest (*f*). Upon the same ground, it was formerly held, that by giving a legacy to an infant, the testator made it necessary to come into this Court for directions how to lay it out; and that, therefore, the costs of a bill by an infant legatee, to have the legacy secured for his benefit, must be paid out of the residue (*g*). Such applications have, however, been rendered unnecessary, by the 36 Geo. III. c. 52, s. 32, which, in the case of an infant, authorizes the executor to pay the legacy into Court; and in *Whopham v. Wingfield*, the Court said, that, in future, the costs would not be given in such a case (*h*).

The rule which throws upon the general assets the costs of litigation, as to any particular fund, will even apply in cases where the testator has directed his *testamentary expenses* to be paid out of the particular fund, the meaning of the words *testamentary expenses* being confined to the usual charges of probate, &c. (*i*): it will also apply, where the difficulty has arisen, not upon a bequest of personal estate but upon a devise of real estate: thus, where a testatrix devised a real estate, subject to the payment of a corn-rent for charitable purpose, to one Christopher Wilson, and it appeared, by the Master's report, that the name of the person to whom the testatrix intended to give the estate was James, instead of Christopher, Lord Langdale, M. R., directed the expenses of the inquiry as to the identity of James Wilson, as well as the costs of making the Attorney-general a party, for the purpose of having the charge of the corn-rent declared void under the Mortmain Act, to be paid out of the personal assets, as the inquiry was rendered necessary by the mistake of the testatrix; and a residuary legatee is only entitled to the residue of the personal estate, after payment of all the costs and charges occasioned by the will (*k*).

(*e*) *Jolliffe v. East*, 3 Bro. C. C. 25.

(*f*) *Nisbett v. Murray*, 5 Ves. 158.

(*g*) *Anon. Mos. 5*; *Whopham v. Wingfield*, 4 Ves. 630.

(*h*) *Ubi supra*, ante, p. 104.

(*i*) *Browne v. Groombridge*, 4 Mad.

495.  
(*k*) *Ripley v. Moysey*, 1 Keen, 579.

It is to be observed here, that in the application of this rule, no distinction exists between cases in which the residue is disposed of, and where it is not (*l*), and that where there are specific bequests and pecuniary legacies, which exhaust the whole estate so that there is no residue, the costs occasioned by the specific bequests will be thrown upon the general fund, out of which the pecuniary legacies are payable (*m*). Thus, in *Barton v. Cooke* (*n*), where there were specific and pecuniary legacies, and the personal estate, after setting apart the specific legacies, was not sufficient to pay all the pecuniary legacies, so that an abatement amongst them became necessary, the costs were ordered to be paid out of the personal estate not specifically bequeathed. The rule will also prevail where property intended to be disposed of, has, in the result, been declared undisposed of; there the costs will not be thrown upon the property so declared to be undisposed of, but, as in other cases, upon the general estate: thus in *Howse v. Chapman* (*o*), where some of the bequests, in favor of the City of Bath, which were specific, were held to be void under the Statute of Mortmain, the costs were ordered, in the first instance, to be paid out of the residue undisposed of, that is, out of the property not specifically given, before any part of the property given to the City of Bath; but, in case of a deficiency, the remainder of the costs were to be defrayed out of the property given to the City of Bath, to which the property well given and the property intended to be given, but which had been held to be undisposed of, were to contribute *pro rata*.

Out of what Fund.

or where there is no disposition of the residue.

Specific legacies not liable to costs.

Costs will not be thrown upon undisposed of property;

So where a legacy given by a will has lapsed by the death of the legatee in the lifetime of the testator, the costs will be paid out of the general fund, and not out of the lapsed legacy (*p*); and the same rule applies where the intestacy, as to part, does not arise from lapse, but from revocation of a bequest, as in *Cresswell v. Cheslyn* (*q*), as explained in the note to *Skrymsher v. Northcote* (*r*); and in the latter case itself, in which the question was raised, that the costs of the suit ought to be paid out of the part undisposed of, and not out of the general estate, but Sir Thomas Plumer decided that the costs should be apportioned (*s*).

nor out of lapsed legacy

nor out of revoked legacy.

- (*l*) *Eyre v. Marsden*, 4 M. & C. 244; *Nisbett v. Murray*, 5 Ves. 149; *Howse v. Chapman*, 4 Ves. 542.  
 (*m*) *Ibid*.  
 (*n*) 5 Ves. 461.  
 (*o*) 4 Ves. 542.  
 (*p*) *Roberts v. Walker*, 1 Russ. & M. 752.  
 (*q*) 2 Eden, 123.  
 (*r*) 1 Swanst. 575.  
 (*s*) *Vide Eyre v. Marsden*, 4 M. & C. 245.

Out of what  
Fund.

— whether  
the bequest is  
specific or pec-  
uniary.

Where an in-  
testacy as to  
part, arises  
from testator's  
intention be-  
ing defeated,  
the part undis-  
posed of, lia-  
ble to no more  
costs than if  
gift had taken  
effect.

General estate  
not liable to  
costs occa-  
sioned by dis-  
cussions be-  
tween parties  
interested in  
particular  
fund.

And it makes no difference whether the property undisposed of, (whether from lapse or from any other cause) was given as a specific or pecuniary bequest, or a share of the residue; in either case, the costs of the suit will not fall on the undisposed of share, but on all the shares; thus in *Ackroyd v. Smithson* (t), the costs were paid *pro rata*, out of the shares of the residue which the legatees took, and those shares which had lapsed; and, in cases where part of the property given to a charity becomes undisposed of, from being within the Mortmain Act, it has been long settled, that the costs are paid *pro rata* out of the property so undisposed of, and the property well bequeathed to the charity (u).

The cases above referred to, establish the principle that, where an intestacy as to part of the personal estate arises from the intention of the testator being defeated by the happening of some event, or by the operation of the Law, the part thus falling to the next of kin, shall in his hands be subject to the same liability as to costs, and no more, that it would have been subject to, if the gift had taken effect; and the principle has been extended to cases where accumulations directed by a will have been declared absolutely null and void under the Thellusson Act, (39 and 40 Geo. III. c. 98). Thus in *Eyre v. Marsden* (x), where Lord Langdale, M. R., having declared, that a direction for the accumulation of the produce of the testator's freehold and personal estate was void under the above Act, and that such parts of the accumulation as arose from the real estate, belonged to the heir, directed the costs of the suit to be paid *pro rata* by the heir and personal representatives, out of the accumulations devolving upon them, Lord Cottenham, upon appeal, varied the decree, by directing the costs to be paid out of the general estate of the testator.

But although the rule is, that the costs of a litigation, in the course of administering a will, are given out of the general assets, in preference to the particular fund, yet this rule prevails only where the question arises between an individual and the executor, or persons taking the bulk of the estate; if there is no question between them, and the question is merely between the persons in-

(t) 1 Bro. C. C. 503. The printed report, however, is silent as to costs; but the direction as to costs is shown by the Registrar's Book, vide 4 M. & C. 245.

(u) Per Lord Cottenham, C., in *Eyre v. Marsden*, 4 M. & C. 245;

and vide Atty.-gen. v. Lord Winchelsea, 3 Bro. C. C. 573; Atty.-gen. v. Hurst, 2 Cox, 364; and *Howse v. Chapman*, ubi supra.

(z) Ubi supra, et vide 2 Keen, 564, S. C.

interested in the particular fund, when separated from the residue, the costs must come out of the particular fund (y) (1).

It is, however, only where the legacy has been separated from the general fund, that the costs of ascertaining who is entitled to it will be paid out of the legacy itself: but it is the ordinary course of the Court, where there is some legacy clearly payable, but it is uncertain who is entitled to it, to order the legacy to be paid into the bank, with liberty for any person interested in it to apply, and to proceed to a distribution of the residue of the testator's estate; in such case, any costs which may afterwards be incurred, in inquiring who is entitled to such legacy, must come out of the particular fund, for the Court will never postpone the distribution of the residue to answer the costs of such inquiry. Where, however, it is not clear that there is any legacy payable, and, before that point is decided, it is necessary that there should be a previous inquiry as to who is entitled in the event of its being payable, the legacy cannot be transferred into the name of the Accountant-general, till the cause comes on for further directions, and in such case the costs will be payable out of the general estate. This appears to have been the rule adopted in *Wallis v. Williams* (z), in which case the legacy was given to "such person of a particular name as should, within a certain time, prove to the executors that he or she was of the eldest line and nearest relation of the testator;" and a question arose, whether the person who had succeeded in making out his claim, should have the costs of the inquiry before the Master, out of the general assets, and it was decided that he should have all his costs out of the assets, except those of making out of his pedigree (a).

In another case, the question was, whether certain legacies were specific or not; and, in the course of such suit, inquiries had been directed as to the appointment of a guardian and maintenance for a specific legatee, who was an infant: the costs of the suit, except as to the inquiries with respect to the guardian and maintenance, were ordered out of the general assets, and the costs as to the guardian and maintenance, were directed to be paid by sale of a

(y) *Jenour v. Jenour*, 10 Ves. 569; vide etiam, *Shaw v. Pickthall*, Dan. Exc. Rep. 92; *Duke of Manchester v. Bonham*, 3 Ves. 61; *King v. Taylor*, 5 Ves. 809.

(z) *Beames on Costs*, Appx. 1.  
(a) *Beames on Costs* (ed 1840), p. 8.

(1) If the devisee of real estate, charged with the payment of a legacy, refuses to pay the same, the costs of the legatee's suit, to recover it, will be a charge upon the real estate. *Birdsall v. Hewlett*, 1 Paige, 82.

Out of what  
Fund.

Where Bank  
of England  
made parties  
for the security  
of the particu-  
lar legacy.

Where other  
questions are  
unnecessarily  
mixed up with  
questions un-  
der will.

Where party  
entitled to  
legacy, &c.  
encumbers his  
legacy costs  
paid out of  
legacy.

In what cases  
costs will be  
apportioned  
amongst dif-  
ferent funds,

sufficient part of the specific legacy (*b*). So, also, the costs of the governor and company of the Bank of England, who are made parties for the security of a legacy, the right to which is under discussion, will be paid out of the legacy (*c*); and if the plaintiffs in a suit relating to the construction of a will, unnecessarily mix up other questions with the questions arising under the will of the testator, the costs of such part of the suit only as relate to the construction of the will, will be paid out of the general assets. Thus, where a doubt arose under a will, whether a legacy given by the testator was undisposed of, and a suit was instituted by the residuary legatees of one of the next of kin of the testator, instead of his personal representative, in the course of which questions arose between them, the costs of so much only of the suit as related to the decision upon the will were ordered to be paid out of the general assets of the original testator (*d*).

It may be remarked that, where a party entitled either to a legacy or share of a residue, encumbers his legacy or share, or by any act of his own occasions additional expense in respect of it, beyond what is necessary for the due administration of the estate, the additional expense will be thrown upon the particular fund or portion: thus where a plaintiff in a suit for a share of a residue, by assigning his interest and taking advantage of the Insolvent Act, had rendered two supplemental bills necessary, the additional costs were thrown on his individual share, as costs occasioned by his own act (*e*). And it may be stated, as a general rule, that where a fund is to be divided between several parties, and one or more of them by charging their shares with mortgages, annuities, or other incumbrances, have contributed to swell the expense of the suit, the practice is to divide the fund in the first place, and direct the Master to calculate the costs of the suit with reference to each share, in which mode of doing it each party bears his own costs most equally (*f*).

The course acted upon in *Bassevi v. Serra*, of apportioning the costs amongst the different parties interested, so as to throw the costs of each party upon his own fund, has been adopted in many other cases where different funds have been the subject of distribution or discussion in the same suit. Thus, in *Leacroft v. Maynard* (*g*), where the testator charged his legacies upon his real

(*b*) *Barton v. Cooke*, 5 Ves. 464.

(*c*) *Hammond v. Neame*, 1 Mad. 38.

(*d*) *Skrymsher v. Northcote*, 1 Swanst. 566.

(*e*) *Brace v. Ormond*, 2 J. & W. 435.

(*f*) *Bassevi v. Serra*, 3 Mer. 674;

14 Ves. 313, S. C.; vide etiam, *Mo-*

*catta v. Lousada*, cited *ibid*.

(*g*) 1 Ves. J. 279; 3 Bro. C. C.

estate, and then bequeathed a legacy to a charity, the amount of which he altered by his codicil, whereupon a bill was filed for the general administration of the testator's estates, and another bill was also necessarily filed by the heir at law to have the legacy bequeathed to the charity declared void under the Statute of Mortmain, and to have the real estate conveyed to him discharged of it; the Court directed that the costs of the suits, so far as related to the personal estate, should come out of the personal estate, and that the costs which related to the real estate should be borne by the real estate, so that the costs of the bill, so unnecessarily filed by the heir, should fall upon the real estate. Similar decrees for an apportionment of costs between real and personal estates, appear to have been made in *Jones v. Mitchell* (*h*), and *Dixon v. Dawson* (*i*).

Out of what Fund.

— between real and personal estate,

In *King v. Taylor* (*k*), where the question was whether a legacy of stock and a share of the residue under a will went to the husband of a married woman who was dead, or to her brother, and the Court decided that the legacy went to the husband, and the share of the residue to the brother, the costs were ordered to be borne by each fund in moieties.

— between legacy and residue.

It may be mentioned, in this place, that where a *cestui que trust*, having a life interest only, is declared entitled to his costs out of the trust estate, the Court will not content itself with merely giving him a *lien* upon the corpus of the estate by the decree, leaving him to enforce it by subsequent proceedings, but it will direct an immediate sale of a sufficient part of the estate to raise the costs: and it appears that the omission of such a provision in the decree may be the subject of a re-hearing (*l*).

Where *cestui que trust* for life entitled to costs out of estate, immediate sale will be directed.

#### SECTION IV.

##### *Of the Principles of Taxation* (1).

It has been stated (*m*), that the Court of Chancery makes a distinction, which does not exist at Law, with regard to the principles of taxation.

(*h*) 1 S. & S. 290.

(*i*) 2 S. & S. 327; vide etiam, 1 Bro. C. C. ed. Belt. 265, n. 3; and *Walter v. Maunde*, 19 Ves. 424.

(*k*) 5 Ves. 806.

(*l*) *Burket v. Spray*, 1 R. & M. 113. It seems, however, that, in such

a case, the party entitled to the costs, instead of appealing, may apply by motion to have them raised by sale; vide *Connell v. Beeby*, Beames on Costs (ed. 1840,) Appx. No. 7.

(*m*) Ante, p. 1517.

(1) See 2 Smith Ch. Pr. (2nd Am. ed.) 636, et seq.; 2 Barbour Ch. Pr. 336, et seq., as to what costs are or are not to be allowed.

Out of what  
Fund.

ciple upon which the Master is to proceed in the taxation of costs, and that this distinction is marked by the term of costs "*as between Party and Party*," and costs "*as between Solicitor and Client*" (n), the Court in the latter case permitting a larger proportion of expenditure to parties holding particular characters, or placed in particular situations, than in others.

Difference  
between them.

With respect to the extent of the difference between the costs allowed upon one principle of taxation, and those allowed upon the other, however important in its consequences, it is not one respecting which any definite rules can be laid down: as far as they can be stated, however, they are clearly expressed by Mr. Sidney Smith, whose experience as an officer of the Court stamps what he states upon this subject with authority of no inconsiderable weight (o).

As between  
party and  
party.

According to that gentleman's statement, the principle, in a taxation as between party and party, is to have a fixed allowance for every proceeding in a suit, which is not varied to meet the circumstances of any particular case. Thus the 13s. 4d., which is allowed as instructions for a bill, covers, *in every case*, all the trouble which a solicitor has in getting together the materials for the suit. It is also a principle to allow or disallow the costs of any proceeding entirely with reference to the result, without regard to the reason upon which such a proceeding was undertaken. Thus the costs of making or opposing a motion or petition (in the absence of any special direction to the contrary) are allowed or disallowed, in the general costs of the suit, entirely with reference to the success of the motion or opposition (o).

As between  
solicitor and  
client.

In costs, as between solicitor and client, the principle is to allow the party as many of the charges which he would have been compelled to pay his own solicitor, as fair justice to the other party will permit.

(n) There is also another species of costs which is sometimes mentioned in the books, viz., costs "*out of purse*," or "*out of pocket*," vide *Aubrey v. Aspinall*, Jac. 441; *ex parte Simpson*, 15 Ves. 476.

It does not distinctly appear in the books what particulars these costs comprehend, but it is presumed that they are confined, as their name imports, to those costs which the party who is to receive them has actually paid out of his *pocket or purse*. Mr. Beames, however, appears to think that they are considered as larger costs; vide Beames on Costs (ed.

1840), p. 144, n. (b). There is also another species of costs, the mention of which frequently occurs, viz. "*fixed costs*," which term is merely made use of in contradistinction to *taxed costs* (i. e., those costs which are the subject of taxation), in cases where the Court, instead of referring to the Master to tax the costs, at once names a specified sum to be paid by the party, as in the case of costs of the day, which, instead of being *taxed*, are now fixed at 10l., unless the Court make order to the contrary; ante, p. 1181-2.

(o) 2 Smith, 462, 3rd ed.

It must not, however, be supposed that, in such a taxation, where the costs are to come out of the pocket of the opposite party, the party, whose costs are to be taxed, is to be allowed every thing which his own solicitor might claim against him upon the taxation of his bill. — “At first sight,” observes Mr. Smith, “a party who is to have his costs, as between solicitor and client, seems to be entitled to every thing that can be claimed against him by his own solicitor ; but, in the details of taxation, there are many charges, which are proper against the client, which it would be improper to fix upon a third party. To take one among many instances — where a defendant, by his own delay, suffers himself to be put into contempt, it is quite fair that he should bear the expense of his own neglect, but it would be very hard to take those costs out of a fund in which any other person is interested (p)” In taxing costs, therefore, as between solicitor and client, two distinct principles are adopted, one where the costs are to be paid out of a general fund, the other where they are to be paid out of the fund of the party himself. This distinction, however, is never made in the order directing the taxation, but only when the order is acted upon ; and, if it is intended that the party, whose costs are to be paid out of the general fund, should be fully indemnified against all expenses, care must be taken to have it so expressed in the order, as it will not be sufficient that the costs are directed to be taxed as between solicitor and client.

Difference between them.

Distinction where they are to be paid out of a general fund, or out of the fund of the party,

— not made in the order.

The recent Orders of May, 1845, have, in some respects, modified the general application of the rules above stated, inasmuch as they both direct many items hereafter to be allowed upon taxation between party and party, which have hitherto only been allowed. In cases, however, not mentioned in the Order itself, the former rules must still apply. According to the 120th Order of May, 1845, “Where costs are to be taxed, as between party and party, the taxing Master may allow to the party entitled to receive such costs all such just and reasonable expenses as appear to have been properly incurred in : —

Effect of Orders of May, 1845, upon taxation as between party and party.

The service of the execution of writs, and the service of orders, notices, petitions, and warrants ;

Advising with counsel on the pleadings, evidence, and other proceedings in the cause ;

Procuring counsel to settle and sign pleadings, and such petitions as may appear to have been proper to be settled by counsel ;

Procuring consultations of counsel ;



Difference  
between them.

Procuring the attendance of counsel in the Master's offices upon questions relating to pleadings or title ;

Procuring evidence by deposition or affidavit and the attendance of witnesses ; and,

Supplying counsel with copies of extracts from necessary documents.

But in allowing such costs, the taxing Master is not to allow to such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for defending his rights, or which appear to have been incurred through over caution, negligence, or mistake, or merely at the desire of the party."

The 121st of the same Orders directs, " that the costs of such copies of pleadings and proceedings as have heretofore been allowed in the taxation of costs between party and party, in country causes, are hereafter to be allowed in the taxation of costs between party and party in town causes."

Costs always  
taxed as be-  
tween party  
and party, un-  
less otherwise  
directed.

The above orders and observations will suffice to convey a general outline of the distinction between costs as between party and party and as between solicitor and client ; we will now proceed to inquire in what cases the Court will direct the costs of a suit to be taxed upon either principle, or rather in what cases the Court will direct the costs of a party to be taxed as between solicitor and client, the general rule of the Court being, that all costs are to be taxed as between party and party, except where they are specially directed to be taxed as between solicitor and client, from which the corollary follows, that, where the Master is simply ordered to tax the party the costs of the suit, it is always construed to mean " as between party and party " (g).

Principle of  
taxation once  
adopted, to be  
followed at  
subsequent  
taxations,

It may be mentioned in this place, that, where the Court has once adopted the principle of taxation as between solicitor and client in favor of a particular individual, or of a particular class, it will, in its future proceedings, wherever it becomes necessary to direct a further taxation of costs, direct them to be made upon the footing of the former taxation ; thus, if, upon the original hearing, the costs of a party have been ordered to be taxed as between solicitor and client, it will, at the hearing upon further directions, direct the subsequent costs of the same party to be taxed in the same manner, even though a different state of circumstances should appear from the Master's report from that which was supposed to exist at the original hear-

ing (r). It is to be recollected, however, that it is only where the former direction for taxation has been made at a hearing of the cause, either original or upon further directions, that the Court will consider itself bound by it, at the subsequent hearing, and that it will not do so where the former direction as to costs has been made upon petition and by consent (s).

Difference between them.  
*secus*, where original order was made upon petition by consent,

It appears to be the general rule of the Court, that, when personal representatives and other trustees are entitled to costs "out of the fund," such costs will be directed to be taxed as between solicitor and client. It is, however, in general, only in cases in which there is a fund under the control of the Court, that such a direction will be given; where there is no such fund, or a bill against the trustee is dismissed, the costs awarded to the trustee will be only the ordinary costs (t).

As between solicitor and client.  
 Trustees and personal representatives entitled to.  
*Secus*, where no fund under control of Court,

Thus, where a testamentary paper was held void for uncertainty, and the bill was dismissed with costs, it was suggested that some of the defendants, being trustees, should receive their costs, as between solicitor and client, but the Court, on the ground that they were trustees of a nullity, and that there was no fund out of which such costs could come, refused to allow them their costs as between solicitor and client, and dismissed the bill, therefore, with costs as between party and party (u).

or where instrument creating trust is void,

So a person who was named in a deed as a trustee, but had not executed the deed, or in any manner accepted the trust, and who, by his answer, had altogether declined it, upon the bill being dismissed against him, was held not to be entitled to have it dismissed with costs, as between solicitor and client, but only with the ordinary costs between party and party (z).

or trustee has not accepted trust.

It has been already stated (y), that in a charity case, where an heir at law was made a defendant, pursuant to an order of the Court, he was allowed his costs as between solicitor and client although there was no resulting trust in his favor (z); and it

In charity cases heir at law will have his costs as between solicitor and client,

(r) Vide ante, p. 1510.

(s) Ibid.

(t) *Edenborough v. The Archbishop of Canterbury*, 2 Russ. 93. In this case, however, the Court gave costs, as between solicitor and client; the Archbishop and Bishop of London, who had been made parties to the suit for the purpose of restraining the induction of an incumbent to a living, or from availing themselves of any lapse which might occur pending the suit; this it did on the au-

thority of *Townshend v. The Bishop of Norwich*, which occurred in 1824.

(u) *Mohun v. Mohun*, 1 Swanst. 201.

(z) *Norway v. Norway*, 2 M. & K. 278; overruling *Sherratt v. Bentley*, 1 R. & M. 655.

(y) Ante, p. 1522.

(z) *Attorney-general v. Haberdashers' Comp.* 4 Bro. C. C. 178; vide etiam, *Attorney-general v. Tonna*, Belt's note to ib.; and Beames on Costs, Appx. 18.

As between  
Solicitor  
and Client.

— also the  
Attorney-  
general,

— and all  
the other  
parties.

*Secus*, in ordi-  
nary suits  
amongst rela-  
tions.

Of administra-  
tor in suits by  
next of kin,  
or by residuary  
legatees.

seems that, in general, in charity cases, the heir will, if he makes no improper point, be awarded his costs as between solicitor and client. This rule was acted upon in *Currie v. Pye* (a), and in *Moggridge v. Thackwell* (b), in which case the heir at law, as well as the Attorney-general and all the other parties, were allowed their costs out of the fund, to be taxed upon the same principle.

It seems also, that in general, where the object of a suit is to establish a charity, and the estate is ample, the costs of all parties, out of the fund, will be taxed as between solicitor and client (c); and, in *Attorney-general v. Carte*, where the decree had merely ordered that the parties should be paid their costs to be taxed by the Master out of the estate, without giving any direction as to the principle of taxation, in consequence of which the Master refused to tax the costs otherwise than as between party and party, the Court entertained a petition for an order that the taxation of the costs should be as between solicitor and client (d).

Upon the first hearing of *Moggridge v. Thackwell* (e), Lord Thurlow gave all the parties their costs out of the estate, as between solicitor and client, on the ground that it was a cause between relations; but Lord Eldon, when it came before him, upon a rehearing, although he made a similar order as to the costs, did so, as well upon the ground that Lord Loughborough had intimated an opinion that the cause ought to be reheard, as upon the circumstances of the case; but it is to be observed that it is by no means the rule, that, in suits amongst relatives as to the distribution of a fund the costs of all parties are to be paid out of the fund, as between solicitor and client; and that, in a suit by some of the next of kin of an intestate, against the administrator and others of the next of kin, for an account and distribution of the intestate's estate, the administrator is the only party entitled to have his costs taxed as between solicitor and client, and the plaintiff and the other next of kin will not have more than the ordinary costs (f). So also, where a bill was filed by one of two residuary legatees for the administration of the estate, the other residuary legatee being a defendant, the usual decree was made; and upon the question being raised, at the hearing on further di-

(a) 17 Ves. 462.

(b) 1 Ves. J. 464; 7 Ves. 36, 68.

(c) Ibid.; and vide *Attorney-general v. Carte*, Beames on Costs, App. 2; 1 Dick. 113, S. C.; and *Bishop of Hereford v. Adams*, 7 Ves. 324; Os-

borne v. Denne, ib. 424.

(d) See ante, p. 19.

(e) 1 Ves. J. 475.

(f) *Trezevant v. Fraser*, Rolls, Aug. 1839.

regions, whether the costs of the plaintiff and defendant should be paid out of the fund, as between solicitor and client, the Vice-Chancellor, after an inquiry into the practice, stated that he could not give the costs out of the fund in Court, as between solicitor and client, without the consent of the defendant (*g*).

As between  
Solicitor  
and Client.

Where a bill has been filed for the general benefit of creditors and legatees, and the estate has proved insufficient, the Court has been in the habit, of late years, of giving the plaintiff his costs of the suit out of the fund realized by his exertions as between solicitor and client. This rule was adopted by Lord Lyndhurst, in *Turner v. Turner* (*h*), and has been sanctioned by Lord Brougham (*i*), by Lord Cottenham, when Master of the Rolls (*k*), and by the V. C. of England (*l*); and it equally applies where the bill has been filed by a simple contract creditor, and the specialty creditors have proved debts to an amount exceeding the value of the assets received (*m*).

Rule in creditors' suits.

Where plaintiff to have costs between solicitor and client.

Where fund is deficient.

Where plaintiff is a simple contract creditor.

But it is only where the fund is insufficient, that the plaintiff, in a suit of this description, will be entitled to have his costs taxed in so favorable a manner; where the fund is sufficient to pay all the debts, and to leave a surplus for the residuary legatee, the plaintiff will only have his costs as between party and party. In a recent case (*n*), however, where, in a creditor's suit, a fund had been realized by the diligence of the plaintiff, and the assets were more than sufficient for the payment of the debts, Lord Langdale, M. R., considering it a hardship that creditors not parties to the suit should come in and reap the benefit of it, without contributing to the plaintiff's extra costs, made an order, by which it was directed that the plaintiff's costs, as between party and party, should be paid out of the fund, and that his extra costs should be paid *pro rata*, by all the creditors who partook of the benefit of the suit (*o*).

Where fund is sufficient to leave a surplus to residuary legatee.

(*g*) *Fenner v. Taylor*, 5 Mad. 470; *Mad. & Geld.* 3, S. C.

(*h*) Cited 2 R. & M. 687.

(*i*) *Hood v. Wilson*, *ibid.*; overruling *Young v. Everest*, 1 R. & M. 426; and *Rowlands v. Tucker*, *ib.* 635.

(*k*) *Larkins v. Paxton*, 2 M. & K. 22.

(*l*) *Tootal v. Spicer*, 4 Sim. 510; and see *Sutton v. Doggett*, 3 Beav. 9.

(*m*) *Barker v. Wardle*, 2 M. & K. 818; ante, p. 1567-8.

(*n*) *Brodie v. Bolton*, 3 M. & K. 168. It may be remarked here, that

where a creditor files a bill on behalf of himself, &c. the defendant may apply to the Court, by motion, at any time before the decree, on payment to the plaintiff of his demand and costs, and that, in such case, the plaintiff's costs will only be taxed as between party and party; *Pemberton v. Topham*, 1 Beavan, 316. If there are any other defendants to the suit, their costs must also be paid; *ibid.*

(*o*) *Stanton v. Hatfield*, 1 Keen, 358. See *Gaunt v. Taylor*, 2 Hare, 420.

As between  
Solicitor and  
Client.

Proceeding  
where costs  
ordered as be-  
tween solicitor  
and client, but  
fund insuffi-  
cient to pay  
them.

Charges and  
expenses, in  
what cases  
allowed.

It may be mentioned here, that where, in a creditor's suit, the costs of all parties had, upon further directions, been ordered to be taxed as between solicitor and client, and paid out of the fund, and upon taxation the fund proved insufficient to pay all the costs, the V. C. of England, upon a petition by the heir and administrator of the debtor, praying that their costs might be paid in the first instance, refused to vary the order, which had been made upon further directions, but directed the fund to be divided amongst all parties, in proportion to their costs (*p*).

It has been stated in a former part of this work (*q*), that, in almost every decree directing an account, there is inserted a declaration that "the Master is to make unto the parties all just allowances," and that, under the head of just allowances, whatever a trustee or personal representative may have expended, in the fair execution of his trust, will be allowed him in passing his account; this, however, applies only to cases in which an account is directed, and it frequently happens that, in suits to which trustees or personal representatives are parties, either as plaintiffs or defendants, and which do not involve any account, the trustees, &c. have incurred expenses which it is very right they should be reimbursed, but which do not fall under the denomination of costs of the suit, even when directed to be taxed as between solicitor and client. Of this nature are, cases laid before counsel, for their opinion preparatory to the institution of the suit, and many other charges of that description, which, where there is a decree directing an account, a trustee would be considered entitled to, under the head of just allowances (*r*), but which, where there is no decree for an account, and consequently no opportunity of claiming just allowances, a trustee would be in danger of losing, especially in cases where the suit does not involve property out of which they can be retained, or disposes of the whole of it, were it not that, in such cases, the Court will extend the order for the taxation of costs, as between solicitor and client, to "*charges and expenses properly incurred*" by the trustee. Under such a direction as this, the trustee may obtain all such expenses as he has properly incurred relating to the trust property, in or in connection with the suit, although they are not properly costs in the cause. The direction to tax costs, charges, and expenses, will

(*p*) *Swale v. Milner*, 6 Sim. 572.

(*q*) *Ante*, p. 1430.

(*r*) *Ibid*.

also, it is stated, be given in the case of a party interested in the fund, where they are payable out of the party's own fund (s). As between Solicitor and Client.

SECTION V.

*Method of Taxation, Etc.*

UNTIL within a very recent period all references for the taxation of costs were made to the Masters in ordinary, who used to be attended for that purpose by the clerks in Court of all parties. In consequence, however, of the multiplicity of business in the Master's offices, it had gradually become the practice to leave all the details of the taxation to the clerks in Court, and only to call upon the Master to decide any question of principle that happened to arise (t). Upon the abolition of the office of the Six Clerks, new officers called Taxing Masters were appointed for this particular duty, and by the 9th Order of October, 1842, they are directed to perform all the duties before that time performed by the Masters in ordinary in relation to the taxation of costs, and the powers and authorities requisite for that purpose, are by the same Order conferred upon them.

The 10th of the same Orders directs, "That all reference to the taxation of costs shall be made to the Taxing Master in rotation; or if there has been any former taxation of costs in the same cause or matter, then to the Taxing Master, before whom such former taxation has taken place, either on a reference from the Court, or upon the request of the Master in ordinary."

Moreover, by the 12th of the same Orders, in cases where the account of any trustee, executor, or administrator, receiver, consignee, or committee, consists in part of any bill of costs; and in cases of any proceedings under the 23rd Order of 1833, (which enables the Master to adjudicate upon the costs of special applications,) or under the 47th Order of August, 1841 (u), and in all other cases where, under any general Order, the Master in ordin-

(s) 2 Smith's Pr. 463, 3rd ed. It is not usual to give a party his "charges and expenses," where there is no fund in Court; but where a defendant put in four insufficient answers, and was committed till he was examined upon interrogatories, Lord Eldon, upon discharging him after

putting in his examination, ordered him to pay to the plaintiff his costs, charges, and expenses; Farquaharson v. Balfour, T. & R. 184; ante, p. 898.


(t) Mr. Mill's Evidence, Chan. Rep. Appx. B. No. 25, p. 557.

(u) Ante, p. 1411.

Where the reference is to tax the costs absolutely.

To whom reference made

Cases where Master-in-Ordinary may request Taxing Master to tax costs.

**Where Master is to tax absolutely.**  any is at liberty to tax the costs of any proceeding before him in respect of any exceptions, or any creditor's charge, or otherwise, he may request the Taxing Master to assist him in taxing the costs, and on receiving such request, the Taxing Master is empowered to proceed to tax and settle such bill of costs.

**Taxing Master may tax without reference.** And now by the 124th Order of May, 1845, "In cases where a bill or petition is dismissed with costs, or a motion is refused with costs, or any costs are by any general or special order ordered or decreed to be paid, the Taxing Master may tax such costs without any Order referring the same for taxation, unless the Court, upon the application of the party alleging himself to be aggrieved, prohibits the taxation of such costs; and the costs to be certified by the Taxing Masters are to be recovered by subpoena."

**Reference in case the parties differ.** There are two methods in which the order as to the taxation of costs may be drawn up — sometimes it is referred to the Taxing Master to tax the costs, and at other times the taxation is only referred to him "in case the parties differ about the same."

Where the Court refers it to the Taxing Master to tax the costs of a party, the solicitor of the party who is to have them, must deliver a bill of his costs to the Taxing Master, who is to tax them, and who furnishes the other side, if desired, with a copy.

**Where party is directed to retain costs out of balance in his hands.** Where the decree orders a party to retain his costs, when taxed, out of the balance in his hands, and to pay the residue into Court, if he delays to get the costs taxed, the proper course is for the other party to move that he may bring his bill of costs to be taxed within a limited time (z).

**Where Master is to tax only in case the parties differ.** Where the direction is to tax costs, "in case the parties differ about the same," the order of proceeding is pointed out by the 76th Order of 1828, and is as follows: — The party claiming the costs must bring the bill of costs into the Master's Office, and give notice of his having so done to the other party (y); and, at any time within eight days after such notice, such other party shall have

(z) *Newsome v. Shearman*, 2 & S. S. 95. In this case the application was, that the defendant might pay the whole sum due from him into Court; but the motion was refused as inconsistent with the order.

(y) In *Aubrey v. Hoper*, 5 Russ. 1, it was insisted, that, by the practice as it existed before the order, the party claiming the costs ought not to carry in his bill to the Master, till he has given the other side an oppor-

tunity of examining the same, by furnishing him with a copy of it; and it was contended that the same practice ought to continue under the new order; but the Court, after having directed a certificate, decided that there was no such practice before the order; and consequently, that under the new order, the party to recover the costs need not give to the other party a copy of his bill before carrying it to the Master's office.

liberty to inspect the same, without fee, and may take a copy thereof, if he thinks fit; and must, at or before the expiration of the eight days, or such further time as the Taxing Master shall in his discretion allow, either agree to pay the costs or signify his dissent therefrom, whereupon he shall be at liberty to tender a sum of money for the costs: but, if he makes no such tender, or if the other party refuses to accept the sum so tendered, the Taxing Master is then to proceed to tax the costs, according to the practice of the Court; and, in case the taxed costs shall not exceed the sum tendered, then the costs of the taxation are to be borne by the other party.

Where Master is to tax only in Case Parties differ.

An order directing the costs of a suit to be taxed, warrants the taxation up to the time of the Master's making his report (z), and this it has been held to do notwithstanding a reservation of subsequent costs, "not provided for by the decree," there being other costs by which these words might be satisfied (a). Where subsequent costs are not intended to be given, the direction should be confined to costs up to the decree, and the question as to subsequent costs should be reserved (b).

Taxation to the time of making report.

An order directing the taxation or payment of costs by two or more parties, is joint and several, and, if one of them dies, the costs may nevertheless be taxed and recovered against the others (c); therefore where, in a suit by several plaintiffs, the costs of the defendants were ordered to be taxed and paid by the plaintiffs, one of whom died, but the Master, nevertheless, proceeded with the taxation of the costs, an application to quash the Master's certificate was refused, the Court being of opinion that the proceeding was regular (d). Upon the same principle, in a tithe suit, where there was a general decree for the taxation and payment of costs by all the defendants, and they all died but one, an application, by the survivor to have the costs of the defendant apportioned, so as to relieve him from the costs of the other defendants, was refused (e).

Order for taxation of costs joint and several.

A bill of costs should be prepared from the entries of payments and attendance in the solicitor's own books (f).

Bill of costs.

The plaintiffs, however numerous, can have but one bill of costs: and the same rule applies to defendants appearing by the same solicitor, however large their number or however diversified

Where several parties appear by one solicitor there must be only one bill

(z) *Quarrell v. Beckford*, 1 Mad. 260; and vide *Clutton v. Pardon*, T. & R. 301, 4. (c) Vide *Poole v. Franks*, 1 Mol. 78.  
(a) *Quarrell v. Beckford*, ubi sup. J. 188. (d) *Meredyth v. Hughes*, 3 Y. & J. 188.  
(b) *Ibid.*; et vide *Seton on Decrees*, 40. (e) *Michel v. Bullen*, 6 Price, 87.  
(f) 2 *Smith, Pr.* 467, 3rd ed.



Bill of Costs.

their interests : thus, if one solicitor is concerned for any number of defendants, whatever their interests may be, he is only entitled to one bill of costs for them all, although he may, in that bill, charge for separate answers of any of them, or for the employment of separate counsel, for any of them at the hearing (*g*). In such cases, however, he can charge only one term fee and one attendance in Court for all of them (*h*).

Where some defendants appearing by the same solicitor petition, and the others appear and consent.

If one or more of several defendants, defending by the same solicitor, present a petition, and the rest, having a different interest to the petitioners, cannot join in the petition, but appear upon it to consent or to submit to the order of the Court, and all are ordered to have their costs of the petition, the solicitor can only be allowed one bill of costs ; nor can he be allowed for separate attendances in Court, but only for separate briefs and separate fees to and attendance upon counsel (*i*).

Where solicitor acts as agent for different solicitors in country.

If a town solicitor happens to be concerned as agent for two different solicitors in the country, or if he himself is properly concerned for some defendants and as agent for others, the case is different, and he will be allowed to bring in two bills of costs ; but he must from the beginning of the suit, keep the defences separate, and take double copies of the bill, &c. as if two solicitors were employed ; if he does otherwise, he will be allowed only one bill of costs, and the two solicitors in the country must divide the fees between them (*k*).

Master sole judge of the propriety of charge.

In taxing costs, the Taxing Master is the sole judge of the fact, whether the business has been done, and of the proper charge to be made, and his decision upon this subject is final. It is also his duty to inquire whether the business was required to be done ; for if the solicitor negligently or ignorantly takes any unnecessary proceedings, it is the duty of the Master to protect the client from any charge in respect of such proceedings (*l*).

Duty of Master.

Method of proceeding where part only of the costs are to be allowed.

When the reference is to apportion the costs of a suit, where part of them only is given to the plaintiff, and no costs are given as to the rest, in this case, the Taxing Master looks over all the folios of the bill, answers, depositions, and proceedings, and only the usual fees of such folios and proceedings as relate to the matter prevailed in are allowed (*m*). In doing this, however, the proper course appears to be, to apportion the costs of all the gen-

(*g*) As to costs of separate answers, where the same solicitor is concerned, vide ante, p. 840.

(*h*) 2 Smith, *Pr.* 467, 3rd ed.

(*i*) Ibid.

(*k*) Ibid.

(*l*) *Alsop v. Lord Oxford*, 1 M. & K. 565.

(*m*) *For. Rom.* 206.

eral proceedings in the cause, so that the party receiving the costs should have a fair proportion of the costs of each proceeding, and not merely those costs which were occasioned by the particular portion of the proceedings of which he is to have the costs. This principle was adopted in a recent case, where, in a suit for the administration of assets, the executor was charged with interest, on the balances in his hands, and the reference was to tax the plaintiffs their costs, as to so much of the suit as sought to charge the executor with interest. The Master, in his taxation of the costs, allowed the plaintiff a portion of every general proceeding in the suit, whereupon the executor presented a petition complaining of the taxation, and insisting that he ought to have been charged with so much only of the costs of the suit as related to the question of interest; but Lord Langdale, M. R., held, that the principle of taxation which had been adopted was right, and dismissed the petition with costs (n).

Where costs are apportioned.

Where one solicitor appears for three several defendants, and the bill, as to one of them, is dismissed with costs, the plaintiff can only be compelled to pay the costs of such proceedings as exclusively relate to that defendant, and one third of the costs of the proceedings taken for all three defendants (o). And it has been held, that where a solicitor appears in a suit for several defendants, one of whom is entitled to his costs out of the fund, and the others not, the costs of the one entitled, are only that proportion of the costs due to the solicitor, with which the solicitor, as between the co-defendants for whom he has acted, could have charged the party entitled (p).

Where bill is dismissed with costs as to one of several defendants appearing by same solicitor

It is to be noticed, that if, upon the taxation of costs, it should be made to appear, that the person who acted as solicitor for either of the parties, had not, at the time such costs were incurred, been admitted a solicitor of the Court, the Master may disallow the whole of such costs, although they have been actually paid by the party (q), even though the costs may have been incurred in a case for the opinion of a Court of Law, directed out of this Court (r),

No costs allowed when solicitor has not been properly admitted

(n) *Heighington v. Grant*, 1 Beavan, 228.

(o) 2 Smith's Pr. 466, 3rd ed. A defendant to a suit in Chancery, appearing by the same solicitor that is employed for other defendants, is not liable to such solicitor for more than his own share; but plaintiffs in a suit are jointly and severally liable to their solicitor for the whole costs of the suit; *ibid*.

(p) *Harmer v. Harris*, 1 Russ. 157.

(q) *Prebble v. Boghurst*, 1 R. & M. 744. If the Master, upon the objection being taken, refuses to disallow the costs, the Court will, upon petition, direct him to review his report, and to disallow the costs in question; *Sumner v. Ridgway*, *ib.* 748.

(r) *Prebble v. Boghurst*, *ubi sup*.

Objections to Master's certificate. or upon an arbitration under an order of the Court (s); and the person acting as solicitor, had been admitted an attorney at law, and has since been admitted a solicitor of the Court (t). And it seems that, even if the fact, that the party was not a solicitor, should be discovered after the costs have been taxed and paid, the Court will entertain a petition to have them refunded (u).

or, if taxed and paid, they may be recovered back.

Rule that Master's certificate of taxation is final. It is stated, by Lord Chief Baron Gilbert (x), that, "by an order of the Court, made in my Lord Keeper Wright's time, no exceptions were allowed to a report of taxing costs;" and "that this rule hath ever been pursued, but with this difference, that where the Master allows such costs as ought not to be allowed, or are not allowable by law,—in this case, the Court will sometimes indulge the party with liberty of excepting, touching this point only; but this very seldom or ever falls out, though in some cases it hath been done."

Rule that the Master's certificate of taxation is final, applies only to the quantum of costs, but not where he has omitted to tax; or has adopted an improper principle. The rule acted upon at present, is very nearly the same; and, generally speaking, it is held, that the Master's report as to costs is final, and that exceptions do not lie to it (y); for the Master is much more competent than the Court to determine the proper amount of charges. When, however, it is said, that the Master's report as to costs is final, the *dictum* must be understood as applying only to the *quantum* of costs allowed or disallowed by the Master (z). If the Master has omitted to tax the costs which have been directed to be taxed, or if it is conceived that in taxing them he has adopted some general principle which cannot be supported, the party complaining has a right to bring that point before the Court (a).

Method of objecting to certificate. The question, in what manner an objection to the Master's report of costs is to be brought before the Court, is one which has given rise to considerable discussion.

Must be by petition, and not exception. In *Pitt v. Mackreth* (b), Lord Thurlow said, that an exception had never been allowed for costs only; and that the regular method was, to state the articles the party meant to object to, in a petition, and to pray leave to except. In *Holbecke v. Sylvester* (c), a

(s) Ibid.

(t) Ibid.

(u) *Coates v. Hawkyard*, 1 R. & M. 746.

(z) *For. Rom.* 206.

(y) *Lucas v. Temple*, 9 Ves. 299;

*Fenton v. Crickett*, 3 Mad. 496;

*Alsop v. Lord Oxford*, 1 M. & K. 564.

(z) *Holbecke v. Sylvester*, 6 Ves. 417. *Attorney-general v. Lord Carrington*, 6 Beav. 460.

(a) *Shewell v. Jones*, 2 S. & S. 172; *Attorney-general v. Drapers'* Comp. 4 Beav. 307.

(b) 3 Bro. C. C. 321.

(c) 6 Ves. 417.

similar doctrine was laid down by Lord Eldon, who said, he understood the practice to be, that if the Master has proceeded upon the costs, but has not allowed several items which are claimed, there must be a petition (*d*); and this appears to be now the general course of proceeding in cases where objections are taken to the principle upon which the Master acted in the taxation of costs (*e*).

Objections to  
Master's  
Certificate.

In *Holbecke v. Sylvester* (*f*), a distinction was attempted at the bar, between cases in which there is an exception for costs only, and those in which the party excepts upon any other ground; in which cases, it was contended, he may add an exception for costs; but in *Lucas v. Temple* (*g*), Lord Eldon expressed doubts as to that distinction, and, observing that frivolous objections would be taken, merely for the sake of objecting for costs, said his opinion was, that exceptions would not lie for *items* of costs which were items properly falling within the description of those costs which the Master was to tax. It is to be observed that, in the above case, Lord Eldon lays stress upon the circumstance, that the objection was to *items* of costs falling within the description of those costs which the Master was to tax; — if the decree has directed costs, and the Master has not taxed them at all, you may except; this distinction was taken by his Lordship himself, in *Holbecke v. Sylvester*, before referred to.

— nor can  
exception as to  
costs be added  
to others.

*Secus*, where  
decree has directed costs,  
and Master has omitted to tax them.

It is to be noticed, that the application to the Court, to review a Master's certificate of taxation, must be by petition, specifying the items objected to, and praying for leave to except will not be regular (*h*). But, although the general form of application to the Court is by petition for liberty to except, the practice of the Court, if it concur with the view taken by the petitioner, is not to put him to take exceptions, but to refer it back to the Master, with directions to review his report, and to make such alteration in it as the justice of the case may require.

Cannot be on  
motion.  
Order upon  
petition.

(*d*) It is remarkable, that, in the above case, his Lordship allowed an exception which had been taken to the Master's report, on the ground that, in taxing the costs of the plaintiffs (mortgagees), relating to their mortgages, he had disallowed the costs occasioned by making certain persons, who were necessary parties, defendants. It may be, that he considered that such disallowance was, in fact, an omission to tax part of the costs, which were directed by the de-


creed to be taxed.

(*e*) Vide observations of Sir W. Grant, M. R. in *Purcell v. M'Namara*, 12 Ves. 170; *Fenton v. Crickett*, 3 Mad. 496; *ex parte Leigh*, 4 Mad. 394; *Shewell v. Jones*, 2 S. & S. 170, 173; vide etiam, *Russell v. Buchanan*, 9 Sim. 167.

(*f*) Ubi supra.

(*g*) 9 Ves. 299.

(*h*) *Attorney-general v. Brown*, 1 M. & K. 567; in re *Congreve*, 4 Beav. 17; see ante, p. 277.

**By Subpœna.**  serve it himself, it is necessary that the person who does serve it, should have, and show to the party on whom he serves it, a letter of attorney from the person to receive the money, authorizing him to receive it for him (t); and, in some books of practice, it is stated that this process is necessary in the case of a *subpœna* for costs, where the person serving it is not the party to receive it (u). This, however, appears to be a mistake, for, as the *subpœna* directs the costs to be paid either to the person named or to *the bearer*, it is not necessary that the bearer should have any other authority to receive the costs than the writ itself (x).

but there must be a demand. The person serving the *subpœna*, whether he be the party entitled to the costs or "*the bearer*," must, however, at the time of service, make a demand of the amount of the costs (y).

Process of contempt upon, where party not privileged. If the party refuse or neglect to pay the costs upon personal service and actual demand, an affidavit of the personal service, demand, and refusal, or neglect, being made and filed by the person serving the process (y), the Clerk of Records and Writs will, where the party does not enjoy the privilege of Parliament, seal an attachment (z); if he is taken thereupon, a commission of sequestration may immediately issue against him, and if the sheriff return *non est inventus*, the party prosecuting the contempt, is entitled either to a commission of sequestration or to an order for the Serjeant-at-arms (a).

Not bailable : It is to be recollected, that the process of the Court to enforce obedience to a *subpœna* for costs, against a party not entitled to privilege, like the process to enforce obedience to a decree for the payment of money, is not a bailable process (b), although, it seems, that if a sheriff, after taking a party upon an attachment for costs, lets him out upon bail, and, *before the return of the attachment*, retakes him, his liability will not be enforced (c).

Where party is a peer or member of Parliament, Where the party served with the *subpœna* for costs is entitled to the privilege of peerage, or is a member of the Commons House of Parliament, the method of enforcing obedience is to obtain an order as of course for a sequestration, *nisi*, and upon affidavit of personal service of such order, it is a motion of course, to make the sequestration absolute.

(t) Ante, 1250.

(u) Prac. Reg. 406.

(z) Vide Beames on Costs (ed. 1840), p. 167; 1 Harr. ed. Newl. 194.

(y) Hawkins v. Hall, 4 M. & C. 280; 1 Harr. 194; Beames's Ord. 170.

(y) An affidavit stating the confession of the party of his having been served with a *subpœna* for costs and

of his not having paid them, has been held sufficient, Cary, 161; Hind, 256,

(n).

(z) Beames on Costs (ed. 1840), p. 165.

(a) 11th Order, August, 1841, ante, p. 1252.

(b) Ante, p. 1252.

(c) Collard v. Hare, 5 Sim. 10.

The course of proceeding, to enforce the payment of costs by corporation aggregate, is the same as that to compel appearance (d). By Subpœna. — or a corporation aggregate.

It is to be remarked that the process by *subpœna* is necessary in those cases only in which costs alone are to be paid by one party to another. Where a debt or legacy, as well as costs, are ordered to be paid to the same person, the decree will cover the costs as well as the debt or legacy, and therefore, in such cases, a *subpœna* is unnecessary (e). Writ of execution, in what cases proper instead of subpœna.

The above methods of proceeding apply to all cases in which costs are to be recovered by *subpœna*; but it is to be observed, that some costs are not recoverable by *subpœna*. Amongst these may be reckoned the costs of contempt. The costs of contempt for want of appearance are enforced by the Clerk of Records and Writs refusing to accept the appearance unless the costs are paid; so, also, in the case of contempt by not putting in an answer, the plaintiff may refuse to accept the answer until the costs of the contempt are discharged (f); or if the answer has been filed, without payment of the costs, he may move to take it off the file for irregularity (g). In other contempts, also, where the party is in custody, the detaining party should take care that the sheriff or other officer does not discharge the prisoner, or that he does not sanction his being discharged until he has paid the costs of contempt. The costs of amending a bill must be made before the bill can be regularly amended. The payment of the costs of exceptions submitted to, is a necessary part of the submission. Costs of contempt not recoverable by subpœna or writ of execution.

In almost all other cases, however, costs payable by one party to another, are recoverable by *subpœna* or writ of execution, and, by the 23rd Order of 1833, the party to whom the costs of applications by warrant, under the 3 & 4 Will. IV. c. 94, are directed to be paid, is entitled to sue out a *subpœna* for the same. Secus, costs of application under 3 & 4 Will. IV. c. 94.

It may be mentioned here, that, where a suit was instituted by a next friend, on behalf of an infant, and the defendant was ordered to pay the costs, but absconded to avoid the process, the Court, the *prochein ami* being very poor, ordered the costs to be raised and paid out of a fund which had been realized in the suit for the benefit of the infant. It is stated, however, that Lord Chancellor King made the order with some reluctance (h). In an Infant's suit where defendant absconded and next friend was poor, costs ordered out of fund.

(d) Ante, p. 535.

(e) Beames on Costs (ed. 1840), p. 166. As the decree does not authorize payment to the bearer, if the bearer is not the person named in the writ

to receive, there must be a power of attorney, ante, p. 1250.

(f) Vide ante, p. 560.

(g) Ante, p. 558-9.

(h) *Staines v. Maddox*, Mos. 319.

By Writ of Execution.

Method of enforcing costs where individual to pay not a party to the record.

A subpoena for costs formerly issued only against persons who were parties to the record (i). If costs were to be recovered against a person not a party to the record, the course of proceeding was, first to get an order *nisi* upon him to pay by a given day; and, if he did not pay by the day named, then to obtain an order that he might pay by another day, or stand committed. We have seen, however, that now the obedience of persons not parties to the record is enforced in the same manner as in the case of persons strictly parties (k).

By *fiery facias* or *elegit* under 1 & 2 Vict. c. 110.

Besides the ancient method of recovering costs by subpoena or writ of execution, the Act for the abolition of Imprisonment for Debt on *Mesne Process* (l), has provided an additional remedy by writs of *fiery facias* and *venditioni exponas* and of *elegit*, by which costs either alone, or together with a sum of money decreed or ordered to be paid by one party to another, may be recovered from the personal or real estate of the party to pay them (s).

The method of carrying the provisions of this Act into effect, has been pointed out by the Orders of the 10th of May, 1839 (t), in the appendix to which Orders will be found the proper form of writs adapted to cases of costs, whether payable alone or together with a sum of money or of a sum of money with interest.

It is to be recollected, that, in any of the above cases, it is necessary that the order or decree under which the costs are to be paid, should be duly passed and entered in the manner already pointed out, at least one month before a writ of *elegit* or of *fiery facias* can be sued out upon it, and that the date of such entry must be marked upon the order (u).

The costs also must be taxed by the Master, and the Master's certificate of such taxation filed, and a copy thereof produced to the Clerk of Records and Writs issuing the writ, together with the decree or order directing the payment.

Where costs are payable out of fund in Court.

The above methods of procuring the payment of costs apply,

(i) Anon. 14 Ves. 207.

(k) Ante, p. 1277.

(l) 1 & 2 Vict. c. 110—By this Act, s. 13 (rendered applicable to decrees and orders by Courts of Equity, by sect. 18), costs may be made a direct charge upon the real

estates of the party to pay them in the manner there pointed out; vide ante, p. 1239.

(s) Vide ante, p. 1237.

(t) Ibid. 1244.

(u) Ibid. 1246.

ly, where costs are payable from one party to another; where <sup>By *Fieri Facias* or *Elegit*.</sup> they are payable out of the fund or estate which is the subject of dispute, the proper course, where the fund is standing in the name of the Accountant-general, is for the party having the carriage of an order to leave the same, together with an office copy of the master's report or certificate, with the clerk of the Accountant-general in whose division the fund is placed, who will prepare a check upon the Bank of England for the amount. The check is then passed through the offices and taken to the Bank of England, in the same manner as checks for the payment of money out of Court in other cases (x).

Where the costs are to be paid out of a fund not in Court, or out of the estate which is the subject of litigation, no subpoena lies <sup>— or out of fund not in Court, or estate.</sup> against the party in whose hands the property is, or in whom the estate is vested, but a sufficient proportion of the fund or estate will be ordered to be sold (y). A direction to this effect, where none is contained in the decree, may be obtained by motion (z). It is usual, however, to insert the order for a sale of the estate, for the purpose of paying the costs, in the decree or order itself, and an omission to do so may be a ground for a rehearing or appeal (a). It has been already mentioned, that, where a tenant for life of an estate is entitled to costs out of the estate, the Court will direct an immediate sale to raise the costs (b).

It has been before stated, that where, after a bill has been dismissed for want of prosecution, the plaintiff files another bill for the same purpose, the Court will suspend the proceedings on the new bill, till the costs of the former suit have been paid, and, that it will even do so where the defendant in the second suit is executor of the defendant in the first suit (c); the same course will also be allowed by the Court where the original bill has been dismissed at the hearing, without prejudice to the plaintiff's filing a new bill for the same matter (d). It seems, however, that the Court will not make such an order if the defendant takes any step in the new cause before applying for it (e).

It may be convenient to mention here, that the 41st order of August, 1841, directs, "that where a defendant in equity files a <sup>Costs of a cross bill for discovery.</sup>

- |                                                                                                               |                                                   |
|---------------------------------------------------------------------------------------------------------------|---------------------------------------------------|
| (x) Smith, 598, 3rd ed.                                                                                       | (a) Vide <i>Burkett v. Spray</i> , 1 R. & M. 113. |
| (y) <i>Cannon v. Beely</i> , 1 Dick. 115; and vide <i>Cannell v. Beeby</i> , S. C.; Beames on Costs, Appx. 7. | (b) Ante, p. 1579.                                |
| (z) <i>Cannell v. Beeby</i> , ubi supra.                                                                      | (c) Ibid. 952.                                    |
|                                                                                                               | (d) <i>Onge v. Truelock</i> , 2 Moll. 41.         |
|                                                                                                               | (e) Ibid.                                         |



How Enforced  
&c.

cross bill against the plaintiff in equity for discovery only, the costs of such bill and of the answer thereto shall be in the discretion of the Court, at the hearing of the original cause."

Under Orders  
of Aug., 1841.

It will be observed, that, according to the strict language of this Order, the discretion conferred by it upon the Court, can only be exercised at the hearing of the original cause. The consequence of this was, that if the plaintiff in the original suit never brought his cause to a hearing, no opportunity was afforded for the exercise of the power of the Court over the costs in the cross cause (*f*).

Moreover, under the practice which prevailed before this Order issued, the defendant to a cross bill for discovery was entitled to move for his costs immediately upon filing his answer, so that in a case where the plaintiff in the original suit dismissed his own bill, not only was the defendant in that suit unable to get the costs of his cross bill for discovery, but he was liable to be compelled to pay the costs of the answer to that bill (*g*).

Under Orders  
of May, 1845.

The 125th Order of May, 1845, without discharging the 41st Order of August, 1841, has removed these evils, by directing that "the costs of a bill of discovery filed by any defendant to a bill for relief, are to be costs in the original cause, unless the Court otherwise orders."

With respect to bills of discovery other than cross bills, there does not seem to be any thing in the recent Order to affect the previous practice, so that now as heretofore a defendant to a bill for discovery may move as of course for his costs as soon as he has put in an answer, and the time for excepting has expired (*h*) (1). Where, however, the bill prays a commission to

Costs of bill  
for discovery.

(*f*) Skipworth v. Westfield, 13 277.

Sim. 265.

(*h*) Attorney-general v. Burch, 4

(*g*) Westfield v. Skipworth, 1 Ph. Mad. 178.

(1) The general practice is, that a plaintiff, who comes merely for discovery and obtains it, shall pay the costs. Burnett v. Sanders, 4 John. Ch. 504; M'Elwee v. Sutton, 1 Hill Ch. 34; King v. Clark, 3 Paige, 76; Weymouth v. Boyer, 1 Vesey, jr. 416; Hervey v. Talbutt, 1 Jac. & W. 197; Fulton Bank v. N. York and Sharon Canal Co. 4 Paige, 127.

But a defendant who has been previously applied to for the information sought by the bill, and has improperly refused to give it, is not entitled to costs, though he makes the discovery when sought by the bill. King v. Clark, 3 Paige, 76; Burnett v. Sanders, 4 John. Ch. 504; M'Elwee v. Sutton, 1 Hill Ch. 34.

In a case where the defendant in a bill of discovery is entitled to costs, he may move for them as soon as the answer is perfected. King v. Clark, 3 Paige, 76.

Where an officer of a corporation is necessarily made a party, for the purposes of discovery merely, if the plaintiff is compelled to pay the costs of such discovery, he may have a decree over against the other parties for such costs. Fulton Bank v. N. York and Sharon Canal Co. 4 Paige, 127.

examine witnesses as well as a discovery from the defendant, the proper time to move for the costs of the discovery is after the return of the commission, for the conduct of the defendant in examining witnesses under the commission may influence the costs (i). How Enforced  
&c.

But in the case of a bill to perpetuate testimony, the defendant may move as of course for his costs, as soon as the witnesses have been examined or the commission executed, and before publication, upon the allegation that he did not examine any witnesses (k). Of bills to per-  
petuate testi-  
mony.

(i) *Banbury v. —*, 9 Ves. 103; *Beavan v. Carpenter*, 11 Sim. 22; *Anon.* 8 Ves. 69. *Foulds v. Midgley*, 1 V. & B. 138;  
(k) *Wright v. Tatham*, 2 Sim. 459; and ante, p. 948-9.

## CHAPTER XXVIII.

## OF REHEARINGS AND APPEALS.

SECTION I. — *General Rules.*

**Different methods of reviewing the decision of the Court.** WHERE a party feels himself aggrieved by a decree or decretal order of the Court, there are three modes by which he may have it either reversed or altered : viz. 1. By a Rehearing before the same or another Judge of the Court ; 2. By an appeal to the House of Lords ; and, 3. By a Bill of Review (1).

**Rehearing before Lord Chancellor, considered as an appeal.** As a rehearing, by the Lord Chancellor, of a decree or order made by the Master of the Rolls or of a Vice-Chancellor, is in fact an appeal ; and, as many of the rules applicable to appeals to the House of Lords, are applicable to those proceedings in common with rehearings before the Lord Chancellor, the present section will be devoted to the consideration of those rules and principles which are common to both proceedings ; and it is to be premised, that, as the term "*appeal*" may be applied to both, it will, where used in the following pages, include rehearings in Chancery as well as appeals to the House of Lords, except in those instances in which the distinction shall be specifically pointed out.

**No appeal from an order or decree by consent,** It is to be recollected, that, except in the instances already pointed out, a decree or order made by consent of counsel, cannot be the subject of appeal (a) (2) ; and it is to be observed, that for

(a) Vide ante, 1179.

(1) In reference to bills of review, see Story Eq. Pl. § 403, et seq. ; 2 Smith Ch. Pr. (2nd Am. ed.) 48, et seq. and notes ; post, chap. 30.

(2) Atkinson v. Manks, 1 Cowen, 691 : Ringgold's case, 1 Bland, 5, 12 ; ib. 18, 270 ; Coster v. Clarke, 3 Edw. 405. See French v. Shotwell, 6 John. Ch. 564 ; Decoster v. La Farge, 1 Paige, 574 ; Monett v. Lawrence, 12 John. 521.

In Ohio, under the Act 1831, giving an appeal "from any final sentence or decree," an appeal lies from a decree in the Common Pleas, taken by consent of parties. Brewer v. Connecticut, 9 Ohio, 189. See Morris v. Davies, 5 Clark & Fin. 163.

Neither will an appeal lie from a decree entered by default. Kane v. Whittick, 8 Wendell, 219.

As to appeals from decrees entered *pro confesso*, see Rowley v. Benthuy-

this purpose, an order, made at the hearing, for the cause to stand over with liberty to the plaintiff to add parties, is considered as an order made by consent, and cannot be appealed from; for "in truth the want of parties is in its nature a reason for diminishing the plaintiff's bill, and it was a matter of relaxation, on the part of the Court, when it permitted the cause to stand over." If the plaintiff is dissatisfied with the opinion of the Court, as to the want of parties, he should let the bill be dismissed, and then appeal from the order of dismissal (b).

Who may Appeal.

— or from an order for cause to stand over, with liberty to add parties.

This rule, however, does not apply to cases in which, upon a demurrer for want of parties, the demurrer is allowed, with liberty to the plaintiff to amend: in such cases the plaintiff, by acquiescing in the undertaking to amend, does not preclude his right of appeal (c).

*Secus*, where made upon hearing a demurrer.

It seems that a party dissatisfied with a decree, will not prejudice his right to appeal, or have the cause reheard, by consenting to an order consequential upon the decree (d); indeed the general rule of the Court being that an appeal or a rehearing does not suspend the proceedings under the decree, it would be absurd to say that, if a party, in order to save the expense of a contest upon a point which, supposing the decree to stand, he could not sustain, should obey the decree, by consenting to an order consequential upon it, he is by such obedience to be deprived of his right to have the case reheard.

Appeal not prejudiced by consenting to an order consequential upon decree;

Where an agreement had been signed by the parties, and by consent made an order of the Court, to submit to such decree as the Court should make, provided it should be on the merits, and not on any mistake in the pleadings, and that neither party should bring an appeal, notwithstanding which, one party petitioned for and obtained, from Lord King, an order for a rehearing; Lord Talbot, although he expressed doubts whether, if the agreement had been disclosed to the Court originally, the order for a rehearing would have been made, yet as his predecessor, who heard the cause, had ordered a rehearing, and thereby shown he was not satisfied with the decree, he refused to discharge it (e).

— nor by agreement not to appeal, *semble*.

(b) *Beresford v. Adair*, 2 Cox, 156.

(d) *Wood v. Griffith*, 1 Mer. 35.

(c) *Ledbetter v. Long*, 4 M. & C.

(e) *Buck v. Fawcett*, 3 P. Wms. 242.

*see*, 16 Wendell, 369; *Hoye v. Penn*, 1 Bland, 35; *Ringgold's case*, ib. 5, 12; *Shye v. Llewellyn*, ib. 18; *McKim v. Thompson*, ib. 270; *Murphey v. Amer. Life Ins. & Trust Co.* 25 Wendell, 249; *Tripp v. Cook*, 26 Wendell, 243; *Hart v. Strong*, 15 Vermont, 377.

Who may Ap-  
peal.

Creditors  
coming in  
under decree,

— may ap-  
peal from the  
decree itself.

Any person,  
bound by de-  
cree, may ap-  
peal.

Remainder-  
man after es-  
tate tail, may  
appeal, and  
file supple-  
mental bill.

It is not necessary, that the person who appeals should be actually a party to the record, provided he has an interest in the question which may be affected by the decree or order appealed from (1); even creditors coming in before the Master, under a decree, have been held entitled to rehear the cause, though not parties to the bill, because the decree affected their interest (*f*). In *Hungerford's case* (*g*), the creditors complained, that the property had not been applied as it ought; and it was objected, that they could not come in under the decree, and impeach the decree; and it was answered that they might, for, if the decree contained in itself a wrong disposition of the property, they, coming in as creditors, had a right to appeal, because the decree bound their rights. In *Osborne v. Usher* (*h*), the same principle is admitted; and it is held, that if the right of a remainder-man, or of any person entitled to the estate in any way, is bound by the decree, he must have a right to appeal from it, as well as the person against whom it was made (*i*).

Upon this ground, it has been determined, that a tenant in tail in remainder expectant, after the determination of a prior estate tail (who would not be a necessary party to a suit affecting the entailed estate, against the prior tenant in tail), has a right to appeal against the decree in that suit; and that he may file a sup-

(*f*) *Giffard v. Hort*, 1 Sch. & Lef.

409.  
(*g*) Cited, *ib*.

(*h*) 6 Bro. P. C. ed. Toml. 20.

(*i*) *Giffard v. Hort*, *ubi supra*.

(1) A party who has no interest in the subject-matter of the suit, or whose interest has ceased since the commencement of it, cannot bring an appeal. *Reid v. Vanderheyden*, 5 Cowen, 719; *Mills v. Hoag*, 7 Paige, 18; *Idley v. Bowen*, 11 Wendell, 238; *Steele v. White*, 2 Paige, 478.

A mere interest in the costs gives no right of appeal in respect to any other matter. *Reid v. Vanderheyden*, 5 Cowen, 719.

No person is authorized to appeal from a decree unless he is injured or aggrieved by it, and a party who is injured or aggrieved by one part of a decree only, cannot by appeal call in question another part of the decree, in which he is not interested. *Cuyler v. Moreland*, 6 Paige, 273; *Idley v. Bowen*, 11 Wendell, 227; *Hone v. Van Schaick*, 7 Paige, 221. And in general no person can bring an appeal unless he was a party, or represents a party in the matter in the Court below; although he may have an interest in the question. *Ludlow v. Greenhouse*, 1 Bligh, (N. S.) 17; *Steele v. White*, 2 Paige, 478.

But it is not necessary that a party should have appeared in the Court below, to entitle him to an appeal. *Hyslop v. Powers*, 9 Paige, 322.

It seems that a person interested in proving a will, may make himself a party to an appeal from the decision of the Court below, although he was not a party to the proceedings in that Court. *Foster v. Tyler*, 7 Paige, 48.

Any one of several against whom a decree is rendered, may appeal from it. *Johnson v. Johnson*, 1 Dana, 366.



## Of Rehearings and Appeals.

on what  
grounds.  
what  
appeals  
lie (1).

The grounds upon which a party may appeal from a decree or order of the Court, or have it reheard, are as numerous and various as the cases themselves, and any attempt at pointing them out would be hopeless. In fact, wherever the Court is called upon to determine a question of Law or of fact, the decision may be the subject of a rehearing or appeal, by any party who considers himself aggrieved by it. The only case in which a party cannot appeal from the decision of the Court, is where the determination complained of is merely the result of the exercise of discretion on the part of the Judge, in a case where the matter was fairly a sub-

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(1) There can be no appeal from an order concerning the mere practice of the Court, or course of proceeding in the cause. *Rowley v. Van Benthuyzen*, 16 Wendell, 369, 371, 378, 379; *Tripp v. Cook*, 26 Wendell, 150, 155.

No appeal lies from a mere initiatory order. See *McCredie v. Senior*, 4 Paige, 378; *Buel v. Street*, 9 John. 443; *Trustees of Huntington v. Nicoll*, 3 John. 566.

No appeal lies from an order directing a sale of the property in litigation, and that the money be brought into Court. *Chapman v. Hammersley*, 4 Wendell, 173; *McKim v. Thompson*, 1 Bland, 172; nor from an order refusing a rehearing of a motion for instructions to a Master, as to the examination of a witness. *Williamson v. Hyer*, 4 Wendell, 170.

In *Robertson v. Bingley*, 1 M'Cord Ch. 351, it is remarked by Nott J. in delivering the opinion of the Court, "I think there is no rule which ought more rigidly to be adhered to, than that an appeal ought not to be allowed from an interlocutory order. There is some difficulty in defining in terms so precise as is desirable, what shall be considered such interlocutory order as to preclude an appeal. But I think it may be laid down as a general rule, that an order which does not put a final end to the case, nor establish any principle which will finally affect the merits of the case, nor deprive the party of any benefit which he may have at a final hearing, ought to be considered an interlocutory order, from which no appeal ought to be allowed." See *Berryhill v. M'Kee*, 3 Yerger, 157; *Gibson v. Randolph*, 2 Munf. 310; *Allen v. Belcher*, 2 Hen. & Munf. 595; *Daniels v. Taggart*, 4 Gill & John. 311; *Hagthorp v. Hook*, 4 Gill & John. 270; *Richardson v. Jones*, 3 ib. 163; *Roberts v. Salisbury*, ib. 425. See the observations of Mr. Justice Bronson on this subject in *Rowley v. Van Benthuyzen*, 16 Wendell, 369, 371, 378, 379.

If an order for an attachment contains a final determination or adjudication that the defendant is in contempt, he may appeal therefrom. *McCredie v. Senior*, 4 Paige, 378. An order directing an issue is a proper subject of an appeal. Ante, 1289, and note to this point.

An appeal will lie from an order refusing to open proofs in a cause, for the purpose of re-examining a witness who, since his examination, has disclosed facts material and pertinent to the issue, which he did not disclose when on examination. This decision proceeds on the ground that the order appealed from affected the merits of the cause. *Beach v. Fulton Bank*, 2 Wendell, 225.

An appeal lies from an order of the Court refusing to dissolve an injunction, and awarding costs against the defendants. *M'Vicar v. Wolcott*, 4 John. Ch. 510. So from an order granting an injunction. *Simpson v. Hart*, 14 John. 65; *Martin v. Dwelly*, 6 Wendell, 11. See *Hoyt v. Gelston*, 13 John. 140. An appeal will lie to the Chancellor from an order of a Vice-Chancellor, made subsequent to a final decree in the cause. *Tripp v. Vincent*, 8 Paige, 176.

ject for the exercise of discretion (1); in such cases, the practice of the Court will not allow an appeal from the discretion of one Judge to that of another.

Upon what grounds Appeal lies.

Upon this ground it is, that the Courts have adopted the rule, that there can be no rehearing or appeal upon the question of costs (2). The foundation of this rule is clearly stated by Lord Hardwicke, in *Owen v. Griffith* (r), viz. "to prevent vexation and trouble; for as cases in Equity often depend on abundance of circumstances, about which, as the reason of mankind might differ, it would (i, e. if the question of costs might be laid open generally) create perpetual appeals." The operation of the rule, however, is strictly confined to cases in which costs are to be paid by one party to another, and do not form any part of the relief sought by the bill, and it is liable to exception, where the costs are payable out of a fund, or are chargeable upon an estate, or are part of the relief to which a party is entitled, and the facts of the case distinctly appear upon the face of the proceedings themselves; so that it is not necessary, in determining the question of costs, upon the appeal, to enter into any investigation of the merits (s) (3). Upon this ground, in the case of *Owen v. Griffith* (t), above cited, Lord Hardwicke entertained an appeal by an incumbrancer, who had brought his bill to compel the payment

Rule that there can be no rehearing or appeal for costs.

Exceptions to rule.

Where costs are payable out of the estate, or are part of the relief, to which plaintiff is entitled.

(r) 1 Ves. 350; Amb. 520, S. C.; vide *Widman v. Kent*, 1 Bro. C. C. 140; 2 Dick. 594; *Williams v. Begnon*, cited ib.; and *Beames on Costs* (ed. 1840), Appx. 10.—It is to be noticed, that a case, in *Moseley*, p. 395, *Gould v. Granger*, which, from the statement of it there, appears to be at variance with the rule laid down, is incorrectly reported; the question having been, not as to the costs of the cause, but as to the cost of the conveyance of the estate; vide *Beames on Costs*, Appx. No. 12; and *Angell v. Davis*, 4 M. & C. 363.

(s) *Angell v. Davis*, 4 M. & C. 360.

(t) *Ubi supra*.

(1) *Tripp v. Cook*, 26 Wendell, 150; *Rogers v. Hosack*, 18 Wendell, 319; *Rowley v. Benthuyssen*, 16 Wendell, 369, 371, 378, 379; *Owings v. Worthington*, 10 Gill & John. 283; *Scott v. Crawford*, 10 Gill & John. 379; *Merriman v. Barton*, 14 Vermont, 501.

(2) A rehearing or appeal is not granted for costs only, except in special cases. *Travis v. Waters*, 1 John. Ch. 48; *Eastburn v. Kirk*, 2 John. Ch. 17; *Ashby v. Kiger*, 3 Rand. 165; *Rogers v. Holly*, 18 Wendell, 350; *Lewis v. Wilson*, 1 M'Cord Ch. 210; *M'Millan v. Eldridge*, Harp. Eq. 260; *Lyles v. Lyles*, 1 Hill Ch. 76, 92.

It is otherwise where a party is entitled to costs as a matter of strict right. *Buloid v. Miller*, 4 Paige, 473; *Winslow v. Collins*, 3 Paige, 88.

A writ of Error will not lie to reverse a decree for costs only; though if a decree be opened as to other points, it may be reformed also in the matter of costs. *Randolph v. Rosser*, 7 Porter, 249; *Hunt v. Lewin*, 4 Stew. & Port. 138.

(3) *Winslow v. Collins*, 3 Paige, 88.



No Appeal for  
Costs Gener-  
ally.

Exception  
where they  
are payable  
out of a gen-  
eral fund.

— or where  
they are given  
out of a fund  
belonging to a  
party who  
ought not to be  
charged with  
them.

of his charge, out of an estate which he had extended by *elegit* upon a judgment, and to whom the Judge below had refused his costs, although he had given him his principal and interest; his Lordship holding, that an incumbrancer upon an estate for a just debt has a lien upon the estate for his costs, as well as his demand; and that, therefore, the appeal, although for costs, affected the merits of the case (*u*).

The same distinction was recognized by Lord Keeper Northington, in *Cooper v. Scott* (*x*), and by Lord Eldon, in *Jenour v. Jenour* (*y*). In that case, the question arose upon the interest of the parties in a trust fund, which had been separated from the general residue, and the bill prayed, that the costs of the suit might be paid out of the general estate; upon the hearing, the costs were ordered to be paid out of the general estate; but on an appeal, although the decree of the Master of the Rolls, upon the right to the fund, was affirmed, Lord Eldon corrected the decree, as to costs, by directing them to be paid out of the particular fund, and not out of the general estate (*z*); holding, that the costs were not within the common rule.

So, in *Taylor v. Popham* (*a*), Lord Eldon states the rule to be, that where the costs are disposed of, as subjects of relief, though they are the subject of appeal, it is not an appeal for costs. In that case, a creditor had a contingent lien upon a particular fund, which had been appropriated to answer it, and an order of Lord Erskine had given, to the solicitors in the cause, a lien for their costs, upon the fund generally;—the question on the appeal was, whether they should have those costs out of the appropriated fund, in preference to the party having the contingent claim upon it; and Lord Eldon's observation upon the question is, "It is quite competent to rehear or appeal upon such a point respecting costs as this; the Court having given costs, has applied the fund of the party to a payment to which it ought not to have been applied."

The same distinction was acted upon by Lord Lyndhurst, in *Bushett v. Spray* (*b*), and has been much considered and approved of by Lord Cottenham in *Taylor v. Southgate* (*c*), *Marsden v. Eyre* (*d*), and in *Angell v. Davis* (*e*); in the last of which

(\*) Vide Lord Cottenham's Judgment in *Angell v. Davis*, 4 M. & C. 363.

(x) 1 Eden, 17; 1 Bro. C. C. 141, n.

(y) 10 Ves. 562.

(z) Vide ante, p. 1576-7.

(a) 15 Ves. 72.

(b) 1 R. & M. 113.

(c) 4 M. & C. 203.

(d) Ibid. 231.

(e) Ibid. 360.

cases, his Lordship founds his judgment upon three very important circumstances which appeared in the case, any of which, his Lordship held, would have been sufficient to sustain the appeal : No Appeal for Costs.  
 1st. The bill prayed, that the defendant might restore the property in question, and pay the costs, asking the payment of the costs, by way of special relief; 2nd. The case was one, in which the proceedings themselves, without going into the details of the transaction, furnished all the information necessary for the purpose of determining the question; and, 3rdly. It was not one of personal costs, in which the Court had ordered one party to pay them, but a case in which the Court had directed them to be paid out of a particular fund.

In a more recent case, Lord Cottenham held, that as a party interested in a fund, might appeal from a decree directing costs to be paid out of that fund; so persons personally ordered to pay costs, might appeal from the decree, on the ground that the costs ought to be paid out of the fund (*f*). The case alluded to was an appeal from a decree by the V. C. of England, with regard to the right to a certain fund in Court, which was claimed by a married woman against her husband, as property settled to her separate use; the Vice-Chancellor held, that the fund belonged to the wife, and ordered the costs of the suit to be paid by the husband and two individuals who were trustees of the settlement. From this decision, two petitions for a rehearing were presented, one by the husband, and the other by the trustees. It was objected, at the rehearing, that the petition of the trustees, being in effect merely an appeal for costs, could not be proceeded with; but Lord Cottenham held, that an appeal for costs under such circumstances, might be sustained, and allowed the argument to go on. Exception, where party is ordered to pay costs, which ought to be paid out of the fund.

Another exception to the general rule as to costs is afforded by a case (*g*) in the House of Lords, which, although made upon the hearing of an appeal from the Court of Session in Scotland, may be cited as applicable to all cases, English as well as Scotch. In that case, it was held, that though an appeal for costs only will not lie, when costs are in the discretion of the Court; yet where the Court is directed, by an Act of Parliament, to give costs, it is a proper subject of appeal, if they are not given according to the requisition of the Act. Where the costs of the proceeding are given by Act of Parliament

The above instances form the only exceptions which have as Rule that no

(*f*) *Bagot v. Bagot*, L. C. July, 1840, MSS.      (*g*) *Tod v. Tod*, 1 Bligh, N. S. 639.

No Appeal for  
Costs.

appeal for  
costs not eva-  
ded by coup-  
ling another  
ground of ap-  
peal.

Exception  
where other  
ground of ap-  
peal is *bona*  
*fide* taken.

Appeal from  
part of a de-  
cree is an ad-  
mission that  
the rest is  
right.

yet been acknowledged, to what may be considered as the general rule of the Court, that there can be no rehearing or appeal for costs, a rule which is very strictly adhered to; so much so, that the Court will not permit it to be evaded, by coupling the appeal for costs with another ground of appeal, which is unfounded, for the mere purpose of giving color to the appeal for costs. Thus, where a rehearing was on the ground, that a defendant, charged by the decree with the payment of a sum of money, ought also to have been charged with interest and costs, the Court was of opinion, that the decree was correct as to interest, which ought not to have been given; it was thought also, that the decree was wrong in not charging the defendant with the costs, nevertheless the decree was affirmed. — “They did not think the claim of interest was frivolous; but, as it was unfounded, the costs were the only thing in question ultimately” (A).

It must not, however, be assumed, from the case last quoted, that, in all cases where the appeal for costs is coupled with other grounds of appeal, the Court will, if it affirms the decree upon the other grounds, refuse to interfere upon the question of costs, if it considers the decision below upon that point to have been wrong; on the contrary, many cases have occurred in which decrees have been varied as to costs, though affirmed on every other point (i). The rule, as to this, is very distinctly laid down by Lord Lyndhurst in *Attorney-General v. Butcher* (k); his Lordship says — “If a party appeals, having a substantial ground of appeal and a fair question to agitate, and brings in the question of costs along with it, he may succeed with respect to the costs, though he does not succeed in the substantial ground of appeal; but if a point is brought forward as a ground of appeal, which, on the slightest consideration, appears to have no substance, it would be too much to vary the decree as to costs. *A point is not to be put forward as a ground of appeal merely for the purpose of covering an appeal on the question of costs.*”

It may be mentioned here, that a party cannot be allowed to appeal *piece-meal*, i. e. he cannot appeal from part of a decree by one petition, and afterwards appeal from another part, by another petition. The rule is, that if a party appeals from a part of a decree, he admits the remainder to be correct (l).

(h) *Williams v. Begnon*, Beames on Costs, Appx. No. 10; vide etiam, *Wirdman v. Kent*, 1 Bro. C. C. 140, S. P.

(i) *Vide Jenour v. Jenour*, 10 Ves. 662; *Squire v. Pershall*, 2 Bro. P. C.

396; *Pitt v. Page*, 1 Bro. P. C. 1; *Wekett v. Raby*, 2 Bro. P. C. 366; *Maguire v. Maddin*, ib. 393.

(k) 4 Russ. 181.

(l) *Norbury v. Meade*, 3 Bligh, 261.

It is an established rule, that an order for a rehearing or an appeal does not stop the proceedings under the decree, or order appealed from, without special order of the Court (*m*) (1); therefore, if a bill is dismissed with costs, the defendant may, notwithstanding an appeal, proceed to recover his costs (*n*).

So also, it has been held, that the circumstance of an appeal depending, is not a reason against the plaintiff filing a supplemental bill for the purpose of carrying it into effect; and where the plaintiff filed such a supplemental bill, apprehending that he had not sufficient parties before the Court, and the defendant demurred, alleging as a ground that the appeal was not determined, the demurrer was overruled (*o*).

The Court, however, will, in some cases, upon special application, suspend the proceedings under a decree or order pending a rehearing, or appeal; thus it has been held, that although a party may proceed by subpœna, to recover his costs, the Court will, when the appeal is lodged, before any step taken, if the subpœna for costs has not issued, order the proceedings upon it to be suspended (*p*).

The Courts, however, are very unwilling to suspend the execution of decrees, and will not do so except in cases where there is danger of the object of the appeal being defeated, before the appeal can be heard (2). Where that is the case, the Court will

Suspending Decrees pending an Appeal

Rehearing or appeal does not stay proceedings for costs.

A supplemental bill may be filed to carry a decree into execution pending an appeal

Suspension of proceedings for costs when not taxed,

but Court unwilling to interfere unless where object of appeal may be lost,

(*m*) Beames's Ord. 265; vide *Gwyn v. Lethbridge*, 14 Ves. 585; *Waldo v. Caley*, 16 Ves. 206; *Willan v. Willan*, ib. 216. (*o*) *Woodward v. Woodward*, 1 Dick. 33. (*p*) *Roberts v. Totty*, 19 Ves. 446; vide etiam, *Meade v. Norbury*, 4 Pri. 322. (*n*) *Tyson v. Cox*, 3 Mad. 278; *Dunster v. Mitford*, cited ibid.

(1) Admitting this now to be the rule in England, in the case of *Green v. Winter*, 1 John. Ch. 80, 81, the Chancellor declares the rule in New York to be different, and that there "an appeal does, in the first instance, stay proceedings on the point appealed from, and that if the party wishes to proceed, notwithstanding the appeal, he must make application to the Chancellor for leave to proceed." "The difference, then," the Chancellor remarks, "between the English practice and ours, is, that by the former the plaintiff must apply for an order to stay the proceedings; but, here, the defendant must apply for leave to proceed." See *Halsey v. Van Amringe*, 4 Paige, 279; *Gregory v. Dodge*, 3 Paige, 90.

By the Laws of New York, 1839, p. 292, § 3, amending the act relative to trial by jury and the taking of testimony in Chancery, it is declared that an appeal from any decision, or order of the Chancellor, either in awarding or refusing an issue, shall not stay proceedings in the cause pending the appeal; unless specially directed by the Chancellor or Vice Chancellor before whom the cause is pending.

(2) How far an appeal shall operate as a stay of proceedings in Equity is a matter regulated in a great degree by, and is very much within, the discretion of the Court of Chancery. *Ringgold's case*, 1 Bland, 15; *Messonier v. Kauman*, 3 John. Ch. 66; *Barrow v. Rhinelander*, ib. 123; 123; *Riggs*

Suspending  
Decrees  
pending an Ap-  
peal.

suspend the execution of a decree or order pending an appeal; thus where the object of a demurrer is to take the opinion of the Court upon the liability of a party to make the discovery required by the bill, the Court will suspend proceedings to enforce an answer pending the appeal from an order overruling the demurrer (*q*).

— or where  
there is danger  
of irreparable  
mischief.

So also, where there would be danger of irreparable mischief (*r*). In cases of injunctions, for instance, and still more in orders dissolving injunctions, an appeal ought almost always to be permitted to stay execution (*s*); upon this ground, likewise, where the Court has directed the sale of property, it will suspend the sale (*t*), or where property of a perishable nature is ordered to be delivered up, it will direct security to be given for the amount of the property (*u*). And so where a specific performance of an agreement for a sale has been decreed, it will suspend the execution of the conveyance till after the appeal, although it will not suspend the other proceedings in the Master's office (*z*).

*Secus*, where  
mischief will  
not be irrepar-  
able.

It seems from the recent cases, that it is the duty of the Court to exercise its discretion according to the circumstances of each particular case (*y*), and no general rule can be laid down upon the subject; thus, although the Court will, as we have seen above, suspend the execution of process to compel an answer, pending an appeal from an order overruling a demurrer, the Court will not suspend the execution of an order for the production of documents pending an appeal from that order; because, although by the operation of the order, the evidence afforded by the documents produced will be disclosed, yet, if it is afterwards decided that the evidence ought not to have been produced, it will go for nothing (*z*).

Not permitted  
when suspend-  
ing the decree  
would be a de-  
cision of the  
question.

So although the effect of an order was to remove a stop placed on a large sum of money which had been impounded in the Court

(*q*) *Wood v. Milner*, 1 J. & W. 636; *The King of Spain v. Machado*, 4 Russ. 560.

(*r*) Vide *Wood v. Griffith*, 19 Ves. 550; *Way v. Foy*, 18 Ves. 452.

(*s*) Vide *Walburn v. Ingilby*, 1 M. & K. 81.

(*t*) *Nerot v. Burnand*, 2 Russ. 56.

(*u*) *Ibid.*

(*z*) *Gwynn v. Lethbridge*, 4 Ves. 58.

(*y*) *Mayor and Corporation of Gloucester v. Wood*, 3 Hare, 154.

(*z*) *Walburn v. Ingilby*, 1 M. & K. 61.

*v. Murray*, ib. 160. See *Green v. Winter*, 1 John. Ch. 80, 81. And the Court may, notwithstanding the appeal, allow the party to proceed to enforce his decree. *Messonier v. Kauman*, 3 John. Ch. 66; *Barrow v. Rhineland*, ib. 123; *Riggs v. Murray*, ib. 160; *Green v. Winter*, 1 John. Ch. 80, 81.

of Common Pleas, and to enable the defendant to obtain uncontrolled possession of the fund, Lord Brougham refused to suspend the operation of the order till the hearing of the appeal, because the granting of such an order would be in effect deciding the matter the other way. "It would be all which the party opposing had been contending for; it would give him the very stop upon the fund for which he had been in vain struggling, and expose his adversary to the delay against which he had been successfully striving; it would be a reversal of a decision, under the form of staying execution" (a).

Of suspending  
Decrees pend-  
ing an Appeal.

The Court, also, has refused to suspend the distribution of a fund by a trustee for charitable purposes, pending an appeal, unless there is something in the situation of the party to make the distribution, as to pecuniary means, authorizing an inference that if he should thereafter be found to have made a wrong distribution, he would not be able to furnish the means of setting it right (b). So also, where a legacy was ordered to be paid out of Court and the decree was appealed from, the Court allowed it to be paid out, notwithstanding the appeal (c).

Sometimes, however, the Court, assuming the decree to be right, will, although it refuses to suspend the proceedings under it, take precautions to prevent the appeal, in case it should succeed, from being nugatory; thus, in the last case, although it would not restrain the payment of the money out of Court, pursuant to the decree, it required the party receiving it to give security, to be approved of by the Master, for its repayment, if the decree should be reversed (d) (1).

Security some-  
times will be  
required to  
refund money.

In like manner where a decree was obtained by an equitable mortgagee for the payment of principal, interest, and costs, within a fixed time, in default of which the estate was to be sold, the Court refused to suspend the execution of the decree, but gave six months on the defendant's bringing the money into Court, consenting to a receiver, and paying the interest and costs, the plaintiff undertaking to repay if the decree should be reversed (e).

Time for fore-  
closure en-  
larged upon  
terms of bring-  
ing in money,  
&c.

The Court will never suspend proceedings under the decree, on the ground that, if they are prosecuted, the parties will, if the de-

(a) *The King of Spain v. Machado*, Suisse v. Ld. Lowther, 2 Hare, 438. cited 1 M. & K. 85, n.

(d) Ibid.

(b) *Waldo v. Caley*, ubi supra.

(e) *Monkhouse v. The Corporation*

(c) *Way v. Foy*, 18 Ves. 452. See *of Bedford*, 17 Ves. 380.

(1) See *City Bank v. Bangs*, 4 Paige, 285; *American Ins. Co. v. Oakley*, 9 Paige, 496.

Of suspending  
Decrees pend-  
ing an Appeal.

Not allowed  
because ex-  
penses may be  
incurred by  
proceedings in  
Master's office.  
— but sales  
of personal  
chattels will  
be stayed.

Suspension of  
proceedings  
under decrees,  
how obtained  
in the House  
of Lords.

Costs of ap-  
plication.  
Notice to Ac-  
countant-gen-  
eral not to  
permit trans-  
fer.

cree is reversed, be put to unnecessary expense (*f*). Thus it is not the habit of the Court to suspend the taking of an account in the Master's office (*g*). Nor will it suspend the proceedings under a decree directing the specific performance of a contract, at least it will not go further than to direct the execution of the conveyance to be stayed (*h*).

Where, however, the decree directs the sale of property, it will sometimes stay the sale; and, if the property consists of personal chattels in the possession of the appellant, it will suspend the proceedings upon the terms of the appellant giving ample security for their value (*i*). With respect to the proper method of obtaining the suspension of proceedings pending an appeal, the 46th Order of 1828, directs, "that every application to stay proceedings upon any decree or order which is appealed from, be made first to the Judge who pronounced the decree or order" (*k*).

It is conceived, however, that this Order does not affect the practice in cases of appeals to the House of Lords, and that the party may still, as before, apply for a stay of proceedings against the decree so appealed from, either to that House or to the Court below (*m*).

The costs of a special application of this nature, where it does not succeed, always follow the judgment (*n*).

If the order appealed against is one which directs the transfer of stock, or payment of money out of Court, and it is wished to prevent the transfer or payment being made pending the appeal, immediate notice of the appeal should be given to the Accountant-General, who, upon such notice, will be justified in delaying to comply with the order till there has been time for the appellant to make a special application to the Court for a stay of proceedings (*o*).

(*f*) The appellant, however, upon a petition of rehearing, is always required to give an undertaking to pay the respondent all such costs as the Court shall award in respect of any proceedings had since the decree or order. *Price v. Dewhurst*, 4 M. & C. 282.

(*h*) *Nerot v. Burnand*, 2 Russ. 56.

(*h*) *Gwynn v. Lethbridge*, 14 Ves. 585.

(*i*) *Nerot v. Burnand*, ubi supra.

(*k*) Before this Order, the application could only be made to the Appellate Court. *Macnaghten v. Boehm*,

1 J. & W. 48; vide etiam, *Huguenin v. Baseley*, 15 Ves. 180; *Gwynn v. Lethbridge*, 14 Ves. 585. It is presumed that the Order as well as the one that follows it, relating to new trials of issues, applies to the office and not to the person of the Judge, see ante, 1314.

(*m*) Vide *Huguenin v. Baseley*, 15 Ves. 180; and *Ord. Dom. Pro.* ibid. 184.

(*n*) *Waldo v. Caley*, 16 Ves. 305; *Willan v. Willan*, ibid. 216.

(*o*) *Ferguson v. Tadman*, 1 R. & M. 331.

SECTION II.

*Of Rehearings and Appeals in the Court of Chancery.*

If a party is dissatisfied with a decree or order which has not been inrolled, the proper course, where it cannot be rectified in the manner already pointed out (a), is to apply, by petition, for a rehearing. This he may do whether the decree or order is made upon the hearing of the cause, or of a demurrer or plea, or upon further directions, or upon exceptions. A decretal order cannot, in fact, be discharged in any other manner, and where an attempt was made to discharge an order, pronounced by consent upon further directions, by motion, on the ground that the party had been surprised, Lord Thurlow refused to make the order upon motion, although he appeared to think, that, where any thing is inserted in a decretal order, as by consent, to which the party has not consented, there must be some way of rectifying it, viz., by bill of review, but that it cannot be done by motion (b).

What decrees or orders may be reheard.

The same rule, also, prevails where the order is made upon a petition (c), in which case the proper course is to apply by petition of rehearing in the same manner as upon a decree or decretal order, the only difference being, that, in case the order appealed from is one made upon petition, the rehearing is usually set down by the Registrar on one of the days appointed for the hearing of cause petitions, and not after the rehearings and appeals already appointed, as in the case of an appeal from a decree (d).

Order made upon petition

This rule, however, does not apply to cases of orders made upon petition *ex parte* at the Rolls (e), which may be discharged upon motion before the Master of the Rolls (f), amongst which cases it seems that orders obtained *ex parte* by petition at the Rolls for the taxation of solicitors' bills were included (g) (1).

Secus, orders of course at the Rolls,

It seems also that an order made upon a petition, presented in a matter under an act of Parliament and not in a cause, may be dis-

— or order under Act of Parliament.

(a) Ante, p. 1233.

(b) Anon, 1 Ves. J. 93.

(c) Bishop v. Willis, 2 Ves. 113.

(d) Vide 2 Smith, 37.

(e) Lees v. Nuttall, 2 M. & K. 284; Bishop v. Willis, ubi supra; Ostle v. Christian, 1 T. & R. 324; Binstead v. Barefoot, 1 Dick. 112; Barnar-

diston v. Gibbon, cited 2 M. & K. 287.

(f) 6th Order of May, 1839.

(g) Clutton v. Pardon, 1 T. & R. 301; Eastwood v. Glenton, 2 M. & K. 280; see post, Taxation of Solicitors' Bills.

(1) Gibson v. Martin, 8 Paige, 481; Rogers v. Hosack, 18 Wendell, 319.



What Decrees or Orders may be reheard. charged upon motion, where the application to discharge it is grounded upon irregularity in the petition itself, and is accompanied by an application to take the petition off the file (*k*).

Orders upon motion not reheard, unless decretal. Orders made upon motion are not proper subjects for a rehearing, but may be varied or discharged, upon application by motion either to the Judge who made the order, or to the Lord Chancellor (*i*). It is to be observed, however, that a decretal order made on motion, such as an order in a foreclosure suit under the statute, cannot be discharged on motion (*k*).

No rehearing where defect may be otherwise remedied. A rehearing ought never to be applied for where the defect, in the decree or order, is one which can be remedied by any of the methods before pointed out, and it is to be observed, that, as it will not be permitted after inrolment, so it cannot be obtained till the decree or order has been passed and entered. Thus, in *Robinson v. Taylor* (*l*), the Court refused to allow a cause to be re-argued upon a petition to alter the minutes, and the same rule was laid down, by Lord Eldon, in *Taylor v. Popham* (*m*), where an application was made to rehear a cause, heard by Lord Erskine, whilst the decree was in minutes.

Proceeding where money has been carried over to a particular account. It frequently happens that, upon the hearing of a cause upon further directions, doubts may exist as to the right to a legacy or other sum of money, *prima facie* payable to an individual, but which the parties claiming are not, at the time, in a situation to discuss; in such cases the practice is to carry over the amount of the legacy or money in the Accountant-general's books to the account of the individual having the *prima facie* right, with directions, however, that it shall not be paid over to him without notice to the party setting up the adverse claim. In such cases, the proper course is, for the party claiming in opposition to the *prima facie* right, not to apply for a rehearing, but he should present a petition to have the money out of Court, and serve it upon the party in whose name the money is standing (*n*) (*1*).

Rehearing only on points existing at the decree. A rehearing can only take place for the purpose of altering the decree upon grounds which existed at the time when the decree

(*k*) In re Dovenbury Hospital, 1 M. & K. 279.

(*i*) If a motion is refused without costs the proper course is to give a fresh notice of motion and to make it again before the Lord Chancellor.

(*k*) *Cadle v. Fowle*, 1 Bro. C. C. 515.

(*l*) 1 Ves. J. 44.

(*m*) 15 Ves. 72.

(*n*) *Barksdale v. Abbott*, 3 Russ. 186.

(1) A decree ordering an account is not such a final decree or determination of the cause as will authorize an appeal from it. *Berryhill v. M'Kee*, 3 Yerger, 157.

was pronounced. Where, therefore, the object is not to correct the decree, but to remedy a grievance consequent upon it, resulting from circumstances *ex post facto*, and not making part of the case, as it originally stood, a rehearing will not be permitted (o). Before what Judge.  
Not to correct subsequent inconvenience.

A cause heard before the Lord Chancellor, may be reheard before the Lord Chancellor or his successor in office (p). Before what Judge.

If it has been heard before any of the other Judges, it may either be reheard before the Judge who heard it, or before the Lord Chancellor, in which case it is generally termed an appeal, although, in fact, it is only a rehearing.

The Master of the Rolls cannot rehear a decree or order of the Lord-Chancellor, unless specially authorized so to do (q), nor of a Vice-Chancellor, for that would be in effect, to rehear a decision of the Lord Chancellor, whose deputies the Vice-Chancellors are; and it has been held that the Master of the Rolls has no authority to discharge or alter an order made by a Vice-Chancellor, even though made *ex parte* (r). Master of the Rolls cannot rehear decree of L. C. or V. C.

By the recent statute, creating two additional Vice-Chancellors (s), it is provided, that "no such Vice-Chancellor shall have power or authority to discharge, reverse, or alter any decree, order, act, matter, or thing, made or done by any other Vice-Chancellor, to be appointed under this Act, not being a predecessor in office of such Vice-Chancellor, nor any decree, order, act, matter, or thing, made or done by any Lord Chancellor, unless authorized by the Lord Chancellor so to do, nor any power or authority to discharge, reverse, or alter any decree, order, act, matter, or thing, made or done by the Master of the Rolls, or the Vice-Chancellor for the time being appointed in pursuance of the Act passed in the 53rd year of King George the Third." The consequence is that no rehearing can take place before a Vice-Chancellor of any decree or order made by the Lord Chancellor unless Vice-Chancellor cannot rehear decrees of M. R. or L. C.

(o) *Bowyer v. Bright*, 13 Price, 316.

(p) *Taylor v. Popham*, 15 Ves. 72.

(q) It has been said that you may move, before the Master of the Rolls, to discharge an order, made by the Lord Chancellor *ex parte*, because, only one side being heard, it is a continuance of the same motion. *Davy v. Hayes*, Mos. 72. It seems, however, that this is only in consequence of a special authority, introduced into the

order, the practice of the Court being, that where there is an *ex parte* application to the Lord Chancellor to introduce into the order, made in such cases, a provision that the other party shall be at liberty to apply to one of the other Judges of the Court to vary or discharge it. *George v. Watmouth*, Law J. 1835, Chan. 61.

(r) *Shirley v. Earl Ferrars*, Law J. 1836, 200; vide etiam, *George v. Watmouth*, ubi supra.

(s) 5 Vict. c. 5.

How often  
Permitted.

How often  
permitted.  
Second rehear-  
ing not pro-  
hibited.

Second rehear-  
ing before the  
Lord Chancel-  
lor not a mat-  
ter of right.

Where the  
case has been  
twice heard  
below, a re-  
hearing before  
the Lord  
Chancellor  
permitted,

— at the in-  
stance of the  
same party.

under a special authority, nor can a Vice-Chancellor rehear any matter in which an order or decree has been made by any other Vice-Chancellor, or by the Master of the Rolls.

The Court seldom allows more than one rehearing, whether the second hearing was before the Judge who heard the cause originally, or before the Lord Chancellor by way of appeal. It must not, however, be understood, that the power of the Court to direct a rehearing before inrolment is limited to one only, the practice of doing so is only a general, not an inflexible rule (t); and there are many cases in the books in which it has been departed from (u). The point was much considered in *Fox v. Mackreth* (x), which had been reheard before Lord Thurlow, upon appeal from the Rolls, when, his Lordship having confirmed the decree at the Rolls, a petition was afterwards presented for a second rehearing, which his Lordship refused to allow. It does not appear, however, from the report of the case by Mr. Cox, that the second petition for a rehearing was rejected, because such a proceeding could not be permitted by the Court; but it had been contended at the bar, that the party was entitled to it as a matter of right; and Lord Thurlow expressed his opinion to be, that, on looking into the cases cited in support of the petition, they did not prove that the practice of the Court was to rehear a rehearing.

But, although this is the rule of the Court, with regard to two rehearings by the Lord Chancellor, cases are not wanting in which the Court has allowed a cause heard and reheard at the Rolls, to be reheard again before the Lord Chancellor; *Pickering v. Lord Stamford* (y) was heard and reheard at the Rolls, and yet a second rehearing was permitted before the Lord Chancellor. In that case, it is true, the party at the first rehearing was successful, and the second rehearing was applied for by a different party. But in *Brown v. Higgs* (z), Lord Eldon entertained the

(t) Per Lord Eldon, *Waldo v. Calley*, 16 Ves. 214; vide etiam *For. Rom.* 183.

(u) Vide *Noel v. Robinson*, 1 Vern. 90; *Lady Falkland v. Lord Cheney*, 5 Bro. P. C. 476; *Parker v. Dee*, 2 Ch. Ca. 200; *Eyton v. Eyton*, 4 Bro. P. C. 149; all which cases are cited in Mr. Hargrave's argument, in *Fox v. Mackreth*, 1 Harg. Jur. Arg. 351; vide etiam, 2 R. & M. 703, in which all the subsequent cases on the subject are collected and referred to.

(z) 2 Cox, 159; and see *Howel v. Howel*, 1 Dick. 426; *East India Company v. Boddam*, 13 Ves. 421.

(y) 2 Ves. J. 272, 581; 3 Ves. J. 332, 492.

(z) 8 Ves. 561. It appears to have been supposed, that although the Lord Chancellor, in this case, entertained the appeal, after the rehearing at the Rolls, he laid down a different rule with regard to future cases; vide *Macintosh v. Townsend*, 16 Ves. 330, 331. It appears, however, from the report, that all his Lordship said, was, that if it should be thought right to prevent this in future, it would be much better done, by some rule of practice, to regulate all cases in fu-

rehearing, though the case had been reheard at the Rolls, at the instance of the same party; and in *Blackburn v. Jepson* (a), a similar proceeding was sanctioned by the same learned Judge. Indeed, when it is considered that, in order to render a decree at the Rolls an efficient decree of the Court by inrolment, it is necessary to obtain to it the signature of the Lord Chancellor, a rule, that the Lord Chancellor cannot rehear the case, because it has been already reheard at the Rolls, would be, in effect, to make the Lord Chancellor a mere ministerial officer, obliging him to affix his signature to a decree of an inferior Judge, whether he approves of it or not, a thing which, in *Brown v. Higgs* (b), Lord Eldon refused to do. In that case, his Lordship said, that the appeal called for his judgment, and that he would not consent that the judgment below should go to the House of Lords, as affirmed by him, without hearing the argument upon it (c).

How often Permitted.

It may be stated, therefore, as the rule of the Court, that there is no positive restriction with regard to the number of rehearings; that the granting or refusing of a rehearing is in the discretion of the Court (d); but that, according to the general course of practice, one rehearing of a case, where the application has been sanctioned by the signature of two counsel, in the manner required by the rules of the Court, whether before the Judge who heard it or before the superior Judge of the Court, is merely a matter of course, the Court giving such credit to the opinion of the counsel who sign the petition, that the cause ought to be reheard, as to order it to be set down (e); this, however, is not the case, after a cause has been already reheard before the appellate tribunal; in such a case, a second rehearing will not be permitted, unless leave should have been previously granted by the appellate Judge, upon a special application for that purpose (f) (1).

No positive restrictions as to number of rehearings,

but after the first, not permitted without special grounds.

And this rule applies, whether the decree upon the first rehearing had the effect of overruling, or of affirming the original deci-

Second petition of appeal will be taken off the file, if without leave

ture, than by his taking upon himself, in the first instance in which it had occurred in experience, to decline the duty of hearing and considering the case.

(a) 2 V. & B. 359; vide etiam, *Omerod v. Hardman*, 5 Ves. 722.

(b) *Ubi supra*.

(c) Vide the judgment of Sir J.

Leach, M. R., in *Deerhurst v. The Duke of St. Albans*, 2 R. & M. 706.

(d) *Mills v. Banks*, 3 P. Wms. 8.

(e) *Cunyngham v. Cunyngham*, Amb. 89, 91; *Atty.-Gen. v. Brooke*, 18 Ves. 325.

(f) *Byfield v. Provis*, 3 M. & C. 437; *Deerhurst v. The Duke of St. Albans*, 2 R. & M. 702.

(1) See *Wilcox v. Wilkinson*, 1 Murphy, 11.

Within what  
Time.

No rehearing  
after inrol-  
ment,

but till inrol-  
ment case is  
always open.

Rehearing  
within twenty  
years after the  
decree was  
pronounced.

sion, and is now so well recognized, that, in the recent case of *Moss v. Baldock* (*g*), Lord Lyndhurst directed a petition of appeal to be taken off the file for irregularity, because it had been presented without special leave after one rehearing.

There can be no rehearing of a decree or order of the Court, after it has been inrolled (*h*), but till inrolment, it is not, as we have seen, a record of the Court, and may be altered upon a rehearing (*i*); an inrolment, however, by one defendant, of a decree dismissing the plaintiff's bill, will prevent the cause being reheard at the instance of another defendant (*k*). Where there has been no inrolment, there is no limitation as to the time within which it will be necessary to apply for a rehearing. By an old Order of the Court (*l*), it is directed, that when any party shall be dissatisfied with the judgment of the Court, given upon the hearing of any cause, exception, plea or demurrer, they do, if so advised, petition for a rehearing of such cause, exception, plea, or demurrer, within a fortnight after the order pronounced (*1*); and if any person shall be advised to appeal from any decree made by his Honor the Master of the Rolls, that such petition be presented, within one month after such decree pronounced (*2*).

This Order, however, has not been followed in practice (*m*), and a rehearing has, as we have seen, been granted at the distance of two years, on the application of a defendant, of a decree nisi made absolute against him, according to the regular practice of the Court (*n*). The Court has, also, reheard a cause at the distance of eighteen years from the time the decree complained of was pronounced (*o*); and has refused to discharge an order for a rehearing, though at the distance of twenty-four years (*p*). In

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|---------------------------------------------------------|------------------------------------------------------------|
| ( <i>g</i> ) 1 Ph. 118.                                 | Ord. 334.                                                  |
| ( <i>h</i> ) Ante, p. 1220-1.                           | ( <i>m</i> ) Vide <i>Wood v. Griffith</i> , 1 Mer. 35, 36. |
| ( <i>i</i> ) Ibid.                                      | ( <i>n</i> ) Vide ante, p. 1207.                           |
| ( <i>k</i> ) <i>Gore v. Purdon</i> , 1 Sch. & Lef. 234. | ( <i>o</i> ) <i>Mills v. Banks</i> , 3 P. Wms. 2.          |
| ( <i>l</i> ) Ord. 25 June, 1724; Beames's               | ( <i>p</i> ) Ibid.                                         |

(1) In *Haywood v. Marsh*, 6 Yerger, 69, it is held that a petition for a rehearing must, according to Chancery rules, be filed at the same term, in which the decree is pronounced.

In Vermont an application for rehearing must be made, and notice served upon the adverse party, within twenty days from the rising of the Court which pronounced the decree. *French v. Chittenden*, 10 Vermont, 127.

(2) See *Jenkins v. Wild*, 14 Wendell, 539; *Tyler v. Simmons*, 6 Paige, 127; *Farley v. Farley*, 7 Paige, 40; *Barclay v. Bowen*, ib. 245; *North Amer. Coal Co. v. Dyett*, 4 Paige, 273; *Eldridge v. Howell*, ib. 457; *Strike v. M'Donald*, 2 Harr. & Gill, 191; *Townsend v. Townsend*, 2 Paige, 413; *Owings v. Owings*, 3 Gill & John. 1; *Smith v. Smith*, 1 Paige, 391; *Fulton Bank v. N. York and Sharon Canal Co.* 4 Paige, 127.

the case of *Scarisbrick v. Lord Skelmersdale* (q), the question arose, before the Duchy Court of Lancaster, upon a petition for rehearing a cause that had been heard by the Vice-Chancellor of the County Palatine. It was, however, determined, with reference to the practice of the Court of Chancery, and the decision was, that, as in the case of a bill of review, twenty years from the time of pronouncing the decree complained of (not from the time of inrolment) (r), are allowed for filing the bill; so in the case of a petition for rehearing the same time must be allowed for presenting the petition.

Petition for Rehearing.

A rehearing may be obtained, after the decree has been carried into execution; and we have seen that, after the trial of an issue, the Court has permitted a petition for a rehearing of the order directing an issue, to come on for hearing, at the same time as a motion for a new trial of the issue (s). So also, where the Court, by decree, directed the bill to be retained, with liberty to the plaintiff to bring an action, which he did, and failed, the Court permitted the cause to be reheard; although, it was objected, that the plaintiff, having acted under the decree himself, by bringing the action, could not be heard to dispute the propriety of it (t).

Where decree has been carried into execution, — by trial of an issue,

In *Fournier v. Paine* (u), before referred to, a rehearing, by way of appeal from an original decree, appears to have taken place after an appeal from an order made upon exceptions to the report of the Master under the decree. In fact, as long as a decree or order remains uninrolled, it is open to a rehearing; but if a party is desirous of obtaining a rehearing, he should, to prevent disappointment, immediately that it is passed and entered, enter, with the secretary of decrees, a *caveat* against its being inrolled (x); and, having done that, he must take care to present his petition for a rehearing, within the time limited for that purpose by the practice of the Court (y); as, if he delays it, and the decree is inrolled, he will be too late, unless he can vacate the inrolment upon any of the grounds already pointed out (z).

— or exceptions have been taken to report made upon the decree. How rehearing prevented.

A petition for a rehearing is intituled in the cause, and if the cause has been heard before the Master of the Rolls, and it is

(q) 4 Y. & C. 106, Exch. Rep.; and *Kelly v. Lennon*, 1 Jones & La Touche, 313.

(r) *Smith v. Clay*, 18 Ves. 325.

(s) *White v. Lisle*, 3 Swanst. 351; ante, p. 1315.

(t) *Brophy v. Holme*, 2 Moll. 1.

(u) 3 M. & K. 207, n.

(x) For the method of preventing the inrolment of decrees, &c., vide ante, 1228.

(y) Vide ante, p. 1230.

(z) Ibid.

Petition for  
Rehearing.

To whom  
addressed;

wished to have it heard again before him, it must be addressed to the Master of the Rolls. If the cause was heard by a Vice-Chancellor, and it is intended to have it reheard by the same Judge, the petition must be addressed to the Lord Chancellor, praying that it may be reheard by such a Vice-Chancellor. If it has been heard, before either the Master of the Rolls or a Vice-Chancellor, and the object is to appeal from his decision to that of the Lord Chancellor, it must be addressed to the Lord Chancellor, as it must also be if the case has been originally heard by the Lord Chancellor, and it is wished to have it reheard by his Lordship.

— must not  
seek rehearing  
of orders in  
different suits.

One petition cannot seek the rehearing of orders made in different suits, though the parties in both suits are the same. Thus, where two bills were filed by the same plaintiff, against the same defendant, and the defendant put in a plea to one and a demurrer to the other, which both came on for argument on the same day, and the V. C. of England made two separate orders, allowing them with costs; whereupon the plaintiff presented a petition of appeal, complaining of both the orders (y), Lord Cottenham considered an objection to the petition, on the ground that it embraced several orders in separate suits, as valid; but, on the plaintiff's counsel electing to treat the appeal as an appeal against the order on demurrer only, and undertaking to amend the petition, by restricting it accordingly, he allowed the argument to proceed.

Form of petition.

With respect to the form of the petition of appeal, the 50th Order of August, 1841, directs "That in any petition of rehearing of any decree or order made by any Judge of the Court, it shall not be necessary to state the proceedings anterior to the decree or order appealed from, or sought to be reheard."

Statement of facts.

It was usual, before this Order, for the petition shortly to state the facts of the case, as they appeared in the pleadings; and it was not irregular for it to set forth the grounds insisted upon in the answer, against making the decree (z). The Order does not seem to have prohibited this practice, but to have left it to the discretion of the counsel by whom it is prepared, to make it a vehicle for a restatement of the case, or not, as he may think it most convenient. As, however, the petition is usually considered as a mere foundation upon which the Chancellor's fiat issues, and is seldom or ever read in Court, in general any restatement of the case must be unnecessary. It is clear, that it must not state any matters which do not appear in the pleadings, or the statement of

(y) *Boys v. Morgan*, 3 M. & C. 661. (z) *Wood v. Griffith*, 19 Ves. 550.

which is not warranted by them (b). If any order of the Court has been made since the decree, for the purpose of carrying its provisions into effect, it should be stated; and the circumstance of such an order having been made by consent, will not prejudice the appellant's right to have the cause reheard (c).

Petition for Rehearing.

Must state orders subsequent to the decree.

Where the petition is improperly framed, *e. g.*, if it make a different case from that on which the decree was made, or introduce representations which were not made in the Court below, the Court will, on application by motion, order it to be taken off the file, with costs, the deposit to go in part of costs (d). It seems, however, that it will, on such an occasion, introduce into the order a proviso, that it is to be without prejudice to the appellant's presenting another petition in more regular form (e).

Irregular petition taken off the file.

It is not necessary that a petition for a rehearing should state the reasons why the party presenting it is dissatisfied with the original decree or order; but it usually states, in a general manner, that he is aggrieved by it, or by part of it; and prays that the cause, &c., may be reheard, and either that the decree may be reversed, or that it may be altered in such points as are objected to.

Not necessary to state reasons.

In *Gifford v. Hort* (f), Lord Redesdale complains of the inconvenience of the practice of not stating the grounds upon which the rehearing is sought; and there can be no doubt, but that much convenience would, in many cases, result from the statement; but the rules of the Court do not require it, though they are sometimes inserted.

A certificate must be annexed to every petition for a rehearing, signed by two counsel, certifying, "that they conceive that the cause is proper to be reheard." This is required in order to guard against the abuse of the right to appeal, by the pledge of counsel, that the case is fit to be reheard (g) (1).

Certificate of counsel.

The counsel who sign the certificate are usually those who were concerned in the original hearing, or at least one of them; and "such credit is given by the Court to their opinion, that the

— generally acted upon.

(b) *Ibid.*; and *Nevinson v. Stables*, 4 Russ. 210.

(c) *Ibid.*

(e) *Wood v. Griffith*, *ubi supra*.

(f) 1 Sch. & Lef. 398.

(d) *Ibid.*

(g) *Monkhouse v. The Corporation of Bedford*, 17 Ves. 380.

(1) *Ex parte Terry*, Rice Ch. 1; *Faussett v. Ormsby*, 1 Irish Eq. 388.



Petition for Rehearing.

Court may hear the petition before it allows the appeal to be set down.

Respondent may apply by motion to have it taken off the file.

Petition how presented.

cause ought to be reheard, that it will, in general, order the cause to be set down," as a matter of course (*h*).

But although the general practice is, for the Lord Chancellor to order the cause to be set down for rehearing, as a matter of course, upon the certificate of counsel, he may, if he has any doubt upon the subject, order the petition itself to come on for hearing, before he orders it to be set down. This, as we have already seen, was done by Lord Thurlow in *Fox v. Mackreth* (*i*) (1).

The proper course, however, is, where there is any irregularity in the petition, for the party respondent to make a special application to the Court, by motion, to have the petition taken off the file; to which may be added, if the order for setting down the petition has been made, an application, that the order may be discharged with costs, which was the course pursued in *Wood v. Griffith* (*k*).

The certificate annexed to the petition, having been duly signed by counsel, the petition and certificate must be left with the secre-

(*h*) Per Lord Hardwicke, in *Cunyngham v. Cunyngham*, Amb. 91; vide Atty. Gen. v. Brooke, 18 Ves. 325; *E. I. Company v. Boddam*, 13 Ves. 423. (*i*) 2 Cox, 159. (*k*) *Ubi supra*.

(1) Rehearings in Equity after a decree are not a matter of right, but rest in the sound discretion of the Court. *Daniel v. Mitchell*, 1 Story C. C. 198; *Land v. Wickham*, 1 Paige, 256; *Travis v. Waters*, 1 John. Ch. 48; *Field v. Schieffelin*, 7 ib. 256. Except in cases provided for by the rules of the Court. *Land v. Wickham*, 1 Paige, 256; *Harrison v. Hall*, 1 Hopk. 112.

If a motion for re-hearing is made for delay it will be refused. *Land v. Wickham*, 1 Paige, 256.

A rehearing will not be granted on account of the discovery of new evidence or new matter, *Mead v. Arms*, 3 Vermont, 148; nor because the importance of the testimony has only been discovered since the decision; if the party had it in his power to ascertain its importance before the hearing and has neglected to do so and obtain the testimony; although the justice of the case might be promoted by it. *Prevost v. Gratz*, 1 Peters C. C. 364. See *Daniel v. Mitchell*, 1 Story C. C. 198; *Hinson v. Pickett*, 2 Hill Ch. 357; *Baker v. Whiting*, 1 Story C. C. 218.

A rehearing will generally not be allowed where the newly-discovered evidence is merely cumulative upon the litigated facts already in issue. *Baker v. Whiting*, 1 Story C. C. 218; *Dunham v. Winans*, 2 Paige, 24. Nor for the purpose of contradicting a witness examined by the adverse party. *Dunham v. Winans*, 2 Paige, 24. Nor to enable a party to release a witness declared incompetent on the hearing, and to re-examine him. *Ib.*

Error of judgment or mistake of law by counsel, as to the pertinency or force of evidence, furnishes no ground for a rehearing. *Baker v. Whiting*, 1 Story C. C. 218. See *Decarters v. Le Farge*, 1 Paige, 574.

It is not enough on an application for a rehearing to show that injustice has been done, but it must be shown that it has been done under circumstances which authorize the Court to interfere. *Walsh v. Smyth*, 3 Bland, 9.

tary of the Lord Chancellor, or Master of the Rolls, according to the address of the petition (l). Proceeding  
upon Petition

The *fiat* of the Lord Chancellor, upon this petition, is usually *fiat* upon. in the following form — “ *Upon the petitioner, or his solicitor, consenting to pay such costs (if any) as the Court shall think fit to award, in respect of any proceedings had since the said decree (or order,) and upon his depositing 20l. (m), with the registrar in a week, let this appeal be set down to be heard before me (his Honor), next after the rehearings and appeals already appointed.*”

The petition having been answered, the undertaking required by the *fiat* to be signed by the petitioner, or his solicitor, must be added to it, and signed accordingly (n). The object of the Court, in requiring this undertaking, was discussed before Lord Cottenham; and it appears, that it is intended to provide for the reimbursement to the respondent, of all such expenses as he may be put to, in prosecuting the decree or order appealed against (1). Undertaking  
to pay costs of  
prosecuting  
decree.

(l) At the same time that the original petition is left, a fair copy of it, together with a full copy of the decree or order appealed from, must be also left, 2 Smith, 31, 3rd edition.

(m) Under the old Orders of the Court, the deposit, upon a rehearing or appeal from a decree, was 10*l.*, and upon the rehearing of any exceptions, 5*l.*, Beames's Ord. 316, 459; but by the 42nd Order of 1828, it is directed that “The deposit upon every petition of appeal or rehearing, has been increased to 20*l.*, to be paid to the adverse party, where the decree or order appealed from is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, unless the Court shall otherwise order.”

Although the Order, above referred to, directs a deposit of 20*l.*, to be paid on every appeal, the practice of the Registrar's office confines it to appeals, or rehearings of decrees or orders upon further directions or exceptions. The deposit taken upon an appeal from an order, made upon petition, is still 10*l.* [The author is indebted for this information to Mr. Latham, of the Registrar's office, the gentleman to whom the deposits are actually paid.]

(n) The 16th Order of 1842 directs, that “That signing of petitions of rehearing and appeal,” shall be one of the duties hereafter to be performed by the solicitors in place of the clerks in Court.

(1) An appeal granted becomes a nullity upon a failure to give the appeal bond as required. *Wickliffe v. Clay*, 1 Dana, 589. The execution of the decree will not be stayed, if no bond be given. *Bryson v. Petty*, 1 Bland, 183.

It is not necessary that an appeal bond should be conformable in all respects to the statute, but only that it be sufficient in substance, so as to secure to the party for whose benefit it is given all his rights. *Foster v. Tyler*, 7 Paige, 48.

Where a suit was against one as executor, and in his own right as legatee, and a decree was made against him personally, he was required, on appealing, to give a bond with surety. *Erskine v. Henry*, 7 Leigh, 378. See *Shearman v. Christian*, 1 Rand, 73; *Wilson v. Wilson*, 1 Hen. & Munf. 15; *Sadler v. Green*, ib. 26.

For other decisions upon appeal bonds, their form, effect, &c. see *Clark v. Clark*, 7 Paige, 607; *Ridabock v. Levy*, 8 Paige, 197; *Tyler v. Simmons*, 6 Paige, 127; *Foster v. Tyler*, 7 Paige, 48; *North Amer. Coal Co. v. Dyett*,

Proceedings  
upon Petition.

Object of the  
undertaking to  
pay costs.

It was contended, by the counsel for the respondent, that the intention of it is to create a liability, on the part of the party signing it, to all the costs of the appeal, but Lord Cottenham was of opinion, that the undertaking is required for the purpose above stated; and that it extends and applies only to such costs as may have been incurred in the prosecution of the decree (*o*) (1).

By the 25th Order of October, 1842, it is directed, "That any solicitor signing any petition of rehearing, or appeal, or any consent to a petition, or any notice of motion, or any proceeding or application to be made by a pauper, shall thereby become subject to all the liabilities to which the sworn clerks have heretofore been subject in respect of such matters."

Notwithstanding the terms of this Order, it seems doubtful whether the clerks in Court incurred any personal liability by signing a petition for rehearing, and consequently whether now the solicitor incurs any liability by so doing (*p*).

Order to set  
down rehear-  
ing.

Payment of  
deposit,

within what  
time.

The undertaking having been signed by the petitioner, or his solicitor, the next step is to obtain from the Registrar the order for setting down the cause for rehearing. For this purpose, the petition, with the Lord Chancellor's *fiat*, and the undertaking annexed, must be taken to the Registrar, who, upon payment of the deposit (2), will file the petition, and draw up the order, which must be passed and entered in the usual way.

It is to be observed, that, by the forms of the *fiat*, the deposit is to be paid within a week after the date of the *fiat*. This order must be complied with, but if, from any circumstance, over which

(*o*) Price v. Dewhurst, 4 M. & C. 282. drawn up in the following form:—  
"upon the petitioner consenting, &c.,  
to be signified by his clerk in Court  
signing the petition." Ex relatione,  
E. D. Colville, Registrar.

(*p*) According to the ancient forms in the Registrar's office, the order to set down the rehearing was, formerly,

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4 Paige, 273; City Bank v. Bangs, ib. 285; Potter v. Baker, ib. 290; Rogers v. Paterson, ib. 450; Eldridge v. Howell, ib. 457; Braxton v. Morris, 1 Wash. 381; Brown v. Mathews, 1 Rand, 462; Syme v. Johnson, 3 Call, 523; Van Wezel v. Van Wezel, 3 Paige, 38; Gregory v. Dodge, ib. 90; Studwell v. Palmer, 5 Paige, 57.

Where there are two distinct orders in the same cause, they may be both included in one notice of appeal and in the same bond; provided the penalty is sufficiently large, and the condition broad enough to secure the payment of the whole amount required to be secured on both appeals. Tyler v. Simmons, 6 Paige, 127. See Gregory v. Dodge, 3 Paige, 90.

(1) See Terry v. Stukely, 3 Yerger, 506.

In Andrews v. Scotton, 2 Bland, 620, it was held, that an appeal bond, on the decree being affirmed, becomes thereby an additional security for the debt.

(2) See Consequa v. Fanning, 3 John. Ch 365.

the appellant has no control, such as its being vacation time, or the absence of the Lord Chancellor from London, the Lord Chancellor's secretary will alter the date of the *fiat*, to meet the emergency of the case (*p*). If the appellant does not comply with the conditions of the *fiat*, the other party may proceed to inrol the decree; where, however, the delay was occasioned by circumstances over which the appellant had no control, the inrolment was vacated (*q*).

Proceedings upon Petition

Where there is an original and supplemental cause, or two supplemental causes, they are considered as one, and the payment of one deposit only is necessary (*r*).

Service of order to set down the rehearing.

The order for setting down the cause for rehearing having been passed and entered, must be served upon all the solicitors of the other parties to the suit, at least all those whose interest is affected by the appeal, in the usual way (*s*).

Petition not served.

It is to be observed that it is the order for setting down the rehearing or appeal that is served upon the parties, and not the petition itself, which is filed with the Registrar, from whom the parties served must obtain copies (*t*).

Time for serving order

It is said that if the order is served so as to give two days' notice of the rehearing it will be sufficient, but it is advisable to serve the order as soon as possible (*u*).

Petition may be withdrawn by consent.

After a petition for a rehearing or of appeal has been presented it may be withdrawn on application by motion, provided it is consented to by the respondent. If not consented to, it cannot be withdrawn, but must come on in its course (*x*).

If appellant does not appear, petition dismissed.

If, when the rehearing is called on, the appellant does not appear, his petition will, upon reading an affidavit of service of the order for setting it down, be dismissed with costs; and so, if the respondent does not appear, the Court will, upon reading a similar affidavit, proceed to hear the appeal *ex parte*.

If respondent does not appear.

Where the appeal is against the whole decree, the cause is, in ordinary cases, actually reheard, that is, the pleadings are opened, and the cause proceeded with exactly as if it were an original hearing. The general rule is, that the appellant is entitled to begin, the only exception to which is where a defendant appeals from a whole decree. The reason for this exception is, that in such a case the plaintiff may adduce new evidence and shape his case differ-

Manner of hearing.

Where defendant appeals from whole decree.

(*q*) Vide *Richards v. Wood*, 2 M. & K. 621; and ante, 1230.

(*t*) 1 T. & V. 736.

(*r*) *Cowper v. Scott*, 1 Eden, 17; cited 1 Bro. C. C. 141, ed. Belt.

(*u*) *Robinson v. Taylor*, 1 Ves. J. 45.

(*s*) Ante, p. 512.

(*x*) *Thomson v. Thomson*, 10 Ves. 30.

(*p*) 2 Smith, 31, 3rd edition.

Proceedings  
upon Petition.

— from  
judgment on  
demurrer.  
Where origin-  
ally heard be-  
fore Lord  
Chancellor.

Who entitled  
to be heard.

Cross appeals.

ently (y). It is, however, in the discretion of the Court to vary these rules (z).

In an appeal against a judgment allowing a demurrer to the whole bill the plaintiff is entitled to begin (a).

It is stated that, when the rehearing is of a cause originally heard before the Lord Chancellor, it must be opened as a case (b), and it is presumed that the same regulation applies to any rehearing before a Judge who heard the cause originally.

It is to be observed, that, in the case of a rehearing or appeal, all parties interested in supporting the decree or order appealed from are entitled to be heard, but that no party, except the appellant, can be heard in support of the appeal. If, therefore, any party, who is not included as a co-partitioner in a petition of rehearing, is desirous of appealing, he must present a separate petition (c) (1), otherwise he will be precluded from all benefit of the appeal, even though the result of it should be to show that the decree was completely wrong, as well against him as against the appellant. Thus, where one of several defendants appealed, and an order was made dismissing the bill, upon grounds which were equally applicable to other defendants, who did not join in the appeal, it was held that such other defendants could have no benefit of the order, although it rendered the decree useless (d). It seems, however, that if the result of the appeal had been otherwise, and the appeal had been dismissed or the decree only slightly varied, the defendants who did not appeal would, if they had been heard in support of the decree, have been entitled to their costs, either to have been paid directly by the defendant who appealed, or by the plaintiff; such costs to be added to the plaintiff's own costs, and reimbursed to him by the appellant (e).

Sometimes where there is an appeal against a part of a decree, the respondent or some other party may feel himself aggrieved by another part; in such cases the proper course is to present a cross appeal. Where that has been done, the last appeal may be brought

(y) *Roberts v. Marchant*, 1 Ph. 370; *Lees v. Nuttall*, 2 M. & K. 819.

(z) *Alexander v. The Duke of Wellington*, 2 R. & M. 35.

(a) *Attorney-general v. Aspinall*, 2 M. & C. 613.

(b) *Anon.* 2 Atk. 49.

(c) 2 Smith, 31, 3rd ed.

(d) *Tasker v. Small*, 1 C. P. Cooper's Reports, 255.

(e) Vide *Stocken v. Stocken*, and *Stubbs v. Sargon*, cited ib. 257.

(1) *Foster v. Tyler*, 7 Paige, 48.

up to be heard at the same time with the first, and one order be made in both (f) (1). Evidence upon

On a rehearing, all depositions taken before the original hearing, though not then made use of, may be read (g) (2). The reason of this is stated by Lord Chancellor Parker, in *Wright v. Pilling* (h), to be, that "the appeal is only to give the Chancellor an opportunity of hearing why he should not inrol, as it is to be inrolled as his decree, therefore the cause is entirely open, and the party at liberty to offer what he can against his signing and inrolling the decree" (i). Of reading new evidence upon.

It seems, however, that if, after the hearing, a witness has been convicted of perjury, the circumstance may be brought before the Court upon a rehearing (k). So also, where a witness in an answer to a bill exhibited against him since the original hearing, had confessed, that, on the day he was examined, he took a bond from the plaintiff, whereby the plaintiff bound himself, that, if he re-

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|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| (f) <i>Blackburn v. Jepson</i> , 2 V. & B. 359.                                                                                                                                                                                                           | & B. 153; <i>Goodyer v. Lake</i> , cited 1 Blunt's Ambler, 90, n. 4.                                                                       |
| (g) <i>Cunyngham v. Cunyngham</i> , Amb. 90; <i>Needham v. Smith</i> , 2 Vern. 463; <i>Dashwood v. Lord Bulkeley</i> , 10 Ves. 237; <i>Buckmaster v. Harrop</i> , 13 Ves. 454; <i>Huddleston v. Briscoe</i> , 11 Ves. 687; <i>White v. Fussell</i> , 1 V. | (h) <i>Proc. in Ch.</i> 4:6.<br>(i) <i>Vide etiam</i> , <i>Gilbert's Eq. Rep.</i> 151, S. C.<br>(k) <i>Needham v. Smith</i> , 2 Vern. 468. |

(1) *Hawley v. James*, 16 Wendell, 61, 85; *Mapes v. Coffin*, 5 Paige, 296; *Clowes v. Dickenson*, 8 Cowen, 338.

A party can appeal only from such parts of a decree as affect himself. *Idley v. Bowen*, 11 Wendell, 227. And if he is aggrieved by part of a decree only, he cannot call in question other parts of the decree in which he has no interest. *Hone v. Van Shaick*, 7 Paige, 222.

(2) In New York, upon the hearing of a cause before the Court below, it is the duty of the clerk to enter in the minutes of the Court all the papers read, or which are agreed to be considered as read, or which are offered in evidence and overruled by the Court; and a certified copy of the clerk's minutes is the proper evidence of those facts upon the hearing of an appeal to the Chancellor. *Studwell v. Palmer*, 5 Paige, 166; *Bloodgood v. Clark*, 4 Paige, 574.

No paper not before the Court below, or offered and rejected, can be used on the hearing of an appeal from its decision. *Studwell v. Palmer*, 5 Paige, 166.

Depositions read on the trial in the Court below without objection cannot be rejected in the appellate Court. *Johnson v. Rankin*, 3 Bibb, 87; *Pillow v. Shannon*, 3 Yerger, 508; *Helin v. Hardin*, 2 B. Monroe, 231, 233. And a general exception to the competency or admissibility of evidence will not avail on appeal. *Benett v. Oliver*, 7 Gill & John. 191, 192.

If an objection to the interest of a witness be not made at the hearing in the Court below, it cannot be made in the appellate Court. *Respass v. Morton*, Hard. 226.

In appeals to the Supreme Court of the United States from the Circuit Courts, in chancery cases, the parol testimony which is heard at the trial in the Court below, ought to appear in the record. *Conn v. Penn.* 5 Wheaton, 424.

Evidence upon  
New evidence  
not allowed,  
unless upon  
giving up  
deposit.

*Secus*, where  
improperly  
rejected.

Does not ap-  
ply to exhibits.

covered the estate in question, he would convey part of it to the witness, the answer was allowed to be read at the rehearing to take off the effect of the witness's evidence (*I*); but it seems that an appellant bringing forward evidence, at the hearing of an appeal, which was not read in the Court below, will not be allowed to read it upon any other terms than those of giving up his deposit (*m*). This, however, can only be where the omission to read the evidence was through the fault of the appellant; where that has not been the case, as where the evidence was tendered, but rejected, it may, if the Court thinks proper, be read at the rehearing without condition.

Upon a rehearing, it is not competent to either party to enter into any evidence requiring new depositions (*n*) (1); but this rule does not prevent the production at a rehearing of exhibits which were not in evidence at the original hearing (*o*), and an order to prove *viva voce* such exhibits at the hearing of the appeal, may be obtained without notice (*p*) (2).

(*I*) Needham v. Smith, 2 Vern. 468. the same time with the rehearing of the original decree. Vide post, Chap. XXIX.

(*m*) Hedges v. Cardonnel, 2 Atk. 408.

(*n*) If new evidence is discovered after the original hearing, the proper course is to obtain leave to file a supplemental bill in the nature of a bill of review, to come on for hearing at

(*o*) For. Rom. 183; Walker v. Symonds, 4 Aug. 1810, cited 1 Mer. 37, n. (*a*).

(*p*) Herring v. Cloberry, Cr. & Ch. 251.

(1) As a general rule, when a rehearing is granted in Equity, the Court will not permit an examination at large; no proof will be admitted but what was heard, or ought to have been heard, upon the original hearing. *Scales v. Nichols*, 2 Yerger, 140; *Dale v. Roosevelt*, 6 John. Ch. 255; *Scribner v. Williams*, 1 Paige, 550; *Mitchell v. Lenox*, 14 Wendell, 662; *Wendell v. Lewis*, 6 Paige, 233; *Lovell v. Hicks*, 1 Irish Eq. 472; *Case v. Towle*, 8 Paige, 479.

If the appellant wishes to offer new evidence, he should in his petition of appeal, ask leave to produce further proofs, and state his excuse for not producing such evidence in the Court below. *Scribner v. Williams*, 1 Paige, 550.

Where there is newly-discovered testimony, such as would authorize a bill of review, or where there has been surprise, by the Court unexpectedly relying on evidence at the hearing, which could be satisfactorily explained by other testimony; in these cases, and perhaps others of a like nature, the Court will permit the testimony to be taken, if it is satisfied by affidavit of its materiality. *Scales v. Nichols*, 2 Yerger, 140.

So it appears a party may be let in to read fresh evidence, not read at the former hearing, where it has been duly taken in chief, and omitted by negligence or other cause to be read, or if the evidence be new matter not before ready, or relates only to papers since found, and which may be proved *viva voce*, at the hearing, or to testimony going to show the incompetency of a witness in a former deposition. *Dale v. Roosevelt*, 6 John. Ch. 255. See *Story v. Johnson*, 1 Irish Eq. 586; *Wendell v. Lewis*, 6 Paige, 233; *Hill v. Chapman*, 1 Sumner's Vesey, 405, note (*a*), and cases cited.

(2) See *Lovell v. Hicks*, 1 Irish Eq. 480. Exhibits read in evidence in the

Moreover, the V. C. of England, on motion, permitted the plaintiff, who had, through the inadvertence of counsel, omitted to prove a will of real estate, in consequence of which the bill was dismissed at the original hearing, to exhibit interrogatories for the examination of witnesses, to prove the will at the rehearing, which was postponed on the terms of their paying the costs of the application, and the costs of the day, and of the original hearing. It is to be observed, however, that in that case the will was not disputed in the cause, and that the omission arose wholly from the inadvertence of counsel (*q*).

Evidence upon Interrogatories to prove will not permitted before rehearing.

It is also to be observed, that, in no case, will the Court permit new evidence to be given, at a rehearing, as to any matter which was not in issue upon the original hearing (*r*).

No evidence as to a matter not in issue.

It may be noticed, in this place, that, in case of a rehearing or appeal, the whole case is open to the respondent; thus, if the appeal is against the whole decree, it is competent to the Court to modify the decree, by making it more favorable to the respondent (*s*); therefore, where a plaintiff who had succeeded in obtaining a decision against the defendant, with costs, not being satisfied with the view the V. C. of England had taken of the case, had the cause reheard before Lord Cottenham, in order to obtain an alteration in the decree more favorable to himself; and Lord Cottenham, upon the rehearing, being of opinion that the plaintiff was not entitled to any relief at all, his Lordship dismissed his bill with costs. In his judgment his Lordship said, "The plaintiff having thought fit to present a petition of rehearing against the whole decree, the defendants are entitled to raise any question (and amongst others the question of costs), which properly arose out of the subject matter of the appeal, and I am bound to deal with the cause as if it now came on before me upon the original hearing (*t*). The result is, the defendants must have their costs of the suit up to and inclusive of the hearing, but I cannot give them their costs of setting the decree right."

Whole case open to respondent.

Respondent may have decree altered although he did not appeal.

So where the appeal is against part of the decree only, the respondent may, if he considers it necessary, go into the whole case and every part of it, whilst, in relation to the appellant, it is only

So where it is against a part only.

(*q*) *Hood v. Pimm*, 4 Sim. 101; see also *Williamson v. Hutton*, 9 Price, 187; *Williams v. Goodchild*, 3 Russ. 92; *Wyld v. Ward*, 2 Y. & J. 331; *Higgins*, 5 Russ. 287. (*r*) *Holt v. Burleigh*, Prec. in Ch. 293. (*s*) *Sullivan v. Jacob*, 1 Moll. 472. (*t*) *Oldham v. Stonehouse*, 3 M. & C. 317.

Court below, without objection, will in the appellate Court be considered as part of the record. *Helm v. Hardin*, 2 B. Monroe, 231, 233.





adverse party, when the decree or order is not varied in any material point, together with the further taxed costs occasioned by the appeal or rehearing, *unless the Court shall otherwise order*. Under this Order it has been held, that the Court has a discretion over the deposit as well as over the costs; and, therefore, in a case before Lord Brougham, upon an appeal, although his Lordship affirmed the decree of the Vice-Chancellor, he did so without costs, and directed the deposit to be returned to the appellant (b). Costs and Deposits upon.

It is to be recollected, that, under the undertaking required to be signed by the appellant or his solicitor, upon obtaining an order to set down a rehearing or appeal, the Court has authority to direct the appellant to pay to the respondent any costs he may have been put to in prosecuting the decree or order appealed from in the Master's office.

A respondent can in no case be made to pay costs; but where he has made use of evidence which was not read at the hearing, that circumstance should be taken into consideration in disposing of the costs of the rehearing (c). Costs never paid by the respondent

We have seen before, that where an appellant makes use of evidence which was not read below, he can only be permitted to do so on condition of giving up his deposit (d).

In *Oldham v. Stonehouse* (e), above referred to, where a plaintiff appealed from a decree which had been pronounced in his favor with costs, and, upon the rehearing, the respondent satisfied the Court that he was entitled to no decree at all, Lord Cottenham, as we have seen, reversed the decree and dismissed the bill, giving the defendants the costs up to, and of the hearing, but he refused to give them the costs of setting the decree right.

### SECTION III.

#### *Of Appeals to the House of Lords.*

Any person who feels himself aggrieved by a decree or order of the Court of Chancery, is entitled, as a matter of right, to appeal to the House of Lords. In what Cases they lie.

The mode of obtaining the interposition of this tribunal, in the From interlocutory orders.

(b) *Rattenbury v. Fenton*, Cooke's 91. Orders, 21

(d) *Ante*, p. 1629-30.

(c) *Williams v. Goodchild*, 2 Russ.

(e) 3 M. & C. 317.

In what Cases  
they lie.

case of an appeal from this Court, is by petition of appeal, which may be preferred from an interlocutory as well as from a final order; in which respect appeals from Courts of Equity, by petition, differ from appeals, by writ of error, from the judgments of the Courts of Law, which will only lie where the judgment is final. The reason for this distinction is stated to be, that Courts of Equity often decide the merits of a case, in intermediate orders, and the permitting of an appeal, in the early stage of the proceedings, frequently saves the expense of further prosecuting the suit; but in actions at Law, no such orders intervene, consequently a writ of error cannot be brought before final judgment (*a*).

Only from decrees or orders pronounced by Lord Chancellor, unless where signed and inrolled.

It is, however, to be observed, that although appeals will lie to the House of Lords, from the interlocutory orders of Courts of Equity, it is only in cases where such orders have been pronounced by the Lord Chancellor; in other cases, appeals from the inferior Judges cannot be maintained, unless they have been signed and inrolled, in which case, as the signature of the Lord Chancellor, (which is necessary, before a decree or order can be inrolled,) converts the decree or order, though pronounced by the Master of the Rolls or a Vice Chancellor, into a decree or order of the Lord Chancellor, an appeal will lie from it to the House of Lords. Where a decree or order has been pronounced by the Lord Chancellor himself, no inrolment is necessary to enable the party aggrieved by it from appealing (*b*).

No inrolment necessary if decree by Lord Chancellor.

No appeal from order not made in a suit.

It may be laid down also, as a general rule, that an appeal to the House of Lords, will only lie from a decree or order made in a cause or suit irregularly instituted (*c*); and that an appeal will not lie, from an order of the Lord Chancellor, in matters of idio-cy or lunacy, there being a distinction between the jurisdiction of the Court of Chancery, and the power of the Lord Chancellor; in those cases, an appeal lies to the Privy Council (*d*). Also, no appeal to the House of Lords lies from an order of the Lord Chancellor, in matters of bankruptcy.

(*a*) Palmer's Prac. of the House of Lords, 1.

(*b*) Vide ante, p. 1223.

(*c*) Palmer's Prac. H. L. 4; yet there is an instance on record in which it was held that a person conceiving himself aggrieved by an order of the Court of Exchequer, not made in any cause, for the filing of an ancient record that had been mislaid, might appeal to the Lords, and the party at whose instance the order

was made, was not permitted to decline their jurisdiction, *Ibid.*; Lord Warton and Squire's Case, Colles' Cases in Parl. 270; sed vide the protest signed by eleven Lords on that occasion, and the resolutions of the House of Commons censuring the interference of the Lords, *Ibid.*; and 8 Harg. State Trials, 175.

(*d*) 3 P. Wms. 108; Rochfort v. Earl of Ely, 1 Bro. P. C. 450.

It seems, likewise, that an appeal will not lie from an order made by the Court, under the authority of an Act of Parliament, specially authorizing such order, unless the power of appealing is given by the Act itself: therefore, where an order was made by the Court of Exchequer, under the authority of an Act of Parliament, to determine the right to a fund in Court, produced from an estate seized under an extent, from which order there was an appeal to the House of Lords, it was determined that an appeal would not lie; for if the case was considered as founded on the extent, it was a proceeding at Law, and could not be brought *per saltum* before the House; and considered as arising on the statute, no authority was given by the Act to hear an appeal against the decision. The appeal was therefore dismissed, after very full consideration (e).

In what Cases they lie.

No appeal from order made under the authority of Act of Parliament.

By a standing Order of March 24, 1725 (f), no petition of appeal from any decree or sentence of any Court of Equity in England or Ireland, or of any Court in Scotland, shall be received after five years from the signing and inrolling or extracting of such decree or sentence, and the end of fourteen days from and after the first day of the session or meeting of Parliament next ensuing the said five years, unless the person, entitled to such appeal, be within the age of one and twenty years, or covert, non compos mentis, imprisoned or out of Great Britain or Ireland; in which case, such person shall be at liberty to bring his appeal within five years next after such disability shall cease, and fourteen days from and after the first day of the session next ensuing the said five years, but not afterwards. This Order was amended in 1829, by substituting two years for five, within which the party must bring his appeal, and by ordering that in no case shall any person be allowed a longer time on account of more absence, to lodge an appeal, than five years from the date of the last decree appealed against (g). It will be observed, that, by the foregoing amended Order, the two years are, in the case of an appeal from a Court of Equity, to be computed from the time of inrolling the decree (h); it has, however, been held, that an appeal brought from a decree more than five years after its inrolment, was saved by being extended to subsequent orders, the appeal from which was brought within two years from inrolling them (i). In *Hicks v. Cook* (k), however, the Lords affirmed the decree, wholly because of the acquiescence (l).

Time limited for presenting appeals generally.

(e) *Wall v. The Attorney-general*,  
Lords' Journ. 1822, Palmer's Prac. H.  
L. 5.  
(f) *Lords' Journal*, 1725.  
(g) *Vide 4 Clark & Finnelly*, 562.

(h) *De Burgh v. Clarke*, *ibid.*;  
*Brook v. Champenown*, *ib.* 247.  
(i) *De Burgh v. Clarke*, *ubi sup.*  
(k) 4 Dow. 29.

(l) Where the time for appealing has been fixed by statute, the Court has

|                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|--------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| In what Cases they lie.                          | By another standing Order of the 13th July, 1678 (l), "Petitions of appeal from a Court of Equity must be presented within fourteen days from the first day of every session or meeting of Parliament after a recess, after which time the Lords will receive no petition of appeal, unless upon a decree made whilst the Parliament is actually sitting; in which case, the party who shall find himself aggrieved, may bring his petition of appeal, provided he presents it within fourteen days after such decree is made and entered in any Court of Equity in England or Wales, twenty days in any of the Courts in Scotland, and forty days in any of the Courts of Equity in Ireland" (m).  |
| Where decree made before sessions of Parliament. |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Where decree made during session.                |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
| Of notice of appeal.                             | The next requisite to be observed, before presenting an appeal, is that of giving notice, or as it is termed in Scotland, <i>intimation</i> , to the other side, of the intention to present it, which is regulated by a standing Order of April 9th, 1812 (n), whereby, "To prevent delay on the part of respondents to appeals, in delivering their printed cases, it is ordered that, previous to any petition of appeal being presented to the House, a notice shall be given to the agents of the parties respondents, of the time when such petition is intended to be presented; and the day of giving such notice shall be indorsed, by the petitioner's agent, on the back of the appeal." |
| Form of.                                         | A petition of appeal to the House of Lords is nearly the same in form <i>mutatis mutandis</i> , as a petition for rehearing in the Court of Chancery (o).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Signature of counsel.                            | By an Order of the 3rd of March, 1697 (p), "All appeals are to be signed by two counsel, but no person may presume, as counsel, to sign any appeal, unless he has been of counsel in the cause below, or shall attend as counsel at the bar of the house, when the appeal                                                                                                                                                                                                                                                                                                                                                                                                                           |

(l) Lords' Journ. 1678.

(o) Ante, p. 1625.

(m) Palmer's Prac. H. L. 13.

(p) Lords' Journ. 1697.

(n) Lords' Journ. 1812.

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no power to extend it, not even on the ground of the mistake of the party; and the lapse of time is an absolute bar to the appeal. *Townsend v. Townsend*, 2 Paige, 413; *Barclay v. Brown*, 7 ib. 245; *Caldwell v. Mayor, &c. of Albany*, 9 ib. 572. Nor can the Court vacate the order, and cause it to be entered as of a more recent date, to enable the party to appeal therefrom, ib.; *Caldwell v. Mayor, &c. of Albany*, 9 Paige, 572.

But where the time for appealing depends on a rule of the appellate Court, such Court, upon sufficient cause shown, may suspend its rule and allow an appeal, although such appeal was not brought within the time prescribed by the rule for appealing. *Caldwell v. Mayor, &c. of Albany*, 9 Paige, 572; *Smith v. Smith*, 1 Paige, 391.

If the appeal is not taken within the proper time, the objection should be taken by motion. It is too late to do so at the hearing. Per *Sutherland J.* in *Disbrow v. Henshaw*, 8 Cowen, 353.

is to be heard; and unless he shall certify that, in his judgment, *there is reasonable cause of appeal*" (q) (1). Petition of Appeal.

But, notwithstanding the latter words in the above order, it appears not to have been the practice, a short time ago, for counsel signing appeals formally to certify that there is reasonable cause of appeal, though the signature of counsel was always understood to import it (r); probably, the omission of this certificate arose from the Order of the House of Lords, which will be noticed presently, requiring the parties to appeals to print their cases forthwith; the object of which appears to have been the same as that requiring the certificate of counsel, viz., to prevent appeals merely for delay and vexation (s). It appears, however, to be now the practice for counsel to certify that there is reasonable cause for appeal (t).

When the petition of appeal has been settled and signed by counsel, with a certificate of reasonable cause, it must be fairly engrossed, that is, transcribed in a strong round hand on parchment, (the words to be written at length) with the names of the counsel, as well to the appeal as to the certificate, copied to it, and the certificate of notice is to be indorsed (u).

A petition of appeal, like all other petitions to the Lords, is presented by a peer, who mentions it to the House in the words of<sup>ed</sup>. the title, and moves that the petition may be read; the clerk, thereupon, reads the prayer, and the proper order is made as a matter of course (x).

This Order, which is called the order of summons, is usually in the following form (2): — Order to answer.

Die Januarii, 18

*"Upon reading the petition and appeal of A. B., complaining of a decree (or order, as the case is,) of the day of and praying, &c. : it is ordered by the Lords, spiritual and temporal, in Parliament assembled, that the said C. D., (the respondent,) may have a copy of the said appeal, and do put in his answer thereto, in writing, on or before the day of*

- |                                                                                                                                                                                                                                                                                                                  |                                                                                                                                                                                                                                                                                                        |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>(g) Palmer's Prac. H. L. 16.<br/>         (r) Per Lord Eldon, Way v. Foy, 18 Ves. 452.<br/>         (s) Ibid.<br/>         (t) Vide Palmer's Prac. H. L. 23.<br/>         (u) Ibid.<br/>         (z) Ibid. 24. The usual mode is for the agent to put the appeal into the hands of the Clerk Assistant at</p> | <p>the House, or to leave it with the Clerk of the Journals at the Parliament Office, either of whom gets a noble Lord to move it; but should it happen that those gentlemen are too much engaged, the agent must apply to some Lord to move the appeal, in which there will be no difficulty, Ib.</p> |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

(1) See *Fulton Bank v. Beach*, 2 Paige, 188.

(2) See *Irving v. Dunscomb*, 2 Wendell, 205.

**Order to Answer.** *next ; and service of this order upon any of his counsel, his clerk in Court, or known agent in the Court below, shall be good service.*

*G. H. R. Cler. Parliame*

**Time for answering.** Upon English appeals the time limited for answering is night, in Scotch appeals, four weeks, and in Irish appeals weeks from the date of the order.

**Of service of the order to answer, &c.** The order in an English cause may be served on the appellant, if in London, or his solicitor. If the appeal be from the order should be sent off without delay, to be served the care must be taken by the appellant's solicitor, to enter in cognizance as after mentioned, otherwise the appeal will fail on ground.

**Service of the order.** The mode of serving the order is by delivering a true copy of it, and at the same time showing the original order. When the order is served, there should be an affidavit of service indorsed on it, in the usual form.

**Recognizance for costs.** The affidavit may be sworn before a Master in Chancery in London, or a Master extraordinary in the country : and in Scotch appeals, affidavits are made before an Irish Master, &c., in the usual manner. If the order, in either case, should be served by a person coming to London, the affidavit can be sworn here (y)

After an appeal has been lodged, the appellant is, within eight days, to enter into recognizance to answer costs, pursuant to the following Standing Order : —

January 26th, 1710, " It is this day ordered, that in all appeals to be brought into this House, from any Court in Westminster Hall, from any Court of Equity in England or from any Court in Scotland, or from any Court of Equity in Ireland, the parties appellant shall, within eight days after the appeal received, give security to the Clerk of the Parliament in recognizance, to be entered in to his Majesty in the penalty of 400*l.*, conditioned to pay such costs to the defendant as the court shall appoint, in case the decree appealed from shall be against him ; and if the appellant or appellants shall neglect to give such security within the time aforesaid, the clerk of the Parliament shall inform the House thereof, and the appeal from thence shall be dismissed (z) ".

**Where appellant is not in London.** If the appellant should not be in London to enter into cognizance, his solicitor, or some other person for him, may

(y) *Palmer's Prac. H. L.* 25.

(z) *Lords' Journ.* 1710.

ter into it, for which the leave of the House must be obtained ; Recognizance  
for Costs.  
this is done upon a motion, to be made by a Lord.

The defeazance of the recognizance is in the following form ; —

*“ The condition of this recognizance is, that whereas A. B., of &c., has brought his appeal before the Right Honorable the Lords spiritual and temporal in Parliament assembled, to be relieved against a decree (or order, as the case is,) of the Court of Chancery of the day of . If, therefore, the said appellant, his heirs, executors, or administrators, shall well and truly pay, or cause to be paid, unto C. D. respondent to the said appeal, his heirs, executors, or administrators, all such costs as the said Lords in Parliament shall appoint, in case the said decree (or order, as the case is,) shall not be reversed, then this recognizance to be void and of none effect, or else to remain in full force and virtue.”*

The recognizance, which is written on unstamped parchment, is signed by the appellant or his surety, and witnessed by the Clerk of the Parliament.

Although the words of the order for entering into recognizances are general, yet in practice, there is an exception, viz. : —

In appeals brought by the Attorney-general on behalf of the Crown, no recognizance for costs is entered into, because costs are never awarded against the king (a). Not required  
in appeals by  
Attorney-gen-  
eral.

If an answer be not put in within the time limited for that purpose, the appellant's agent should obtain a peremptory order upon the respondent to answer (b) (1). Peremptory  
order to an-  
swer.

To obtain such peremptory order, the appellant's agent leaves at the Parliament office the first order with the affidavit of service, and upon the clerk's reading the affidavit in the House, the peremptory order is made as a matter of course ; but, in point of regularity, this order ought to proceed upon the motion of a peer (c).

A week is always the time limited by a peremptory order, and, upon the expiration of the week, if no answer has been put in, the appellant's agent may apply to the House by motion, to be made by a peer, to have the cause appointed for hearing *ex parte*.

(a) Palmer's Prac. H. L. 28.

(c) Palmer's Prac. H. L. 28.

(b) Lords' Journ. Jan. 19, 1719.

(1) See Irving v. Dunscomb, 2 Wendell, 205 ; Waters v. Travis, 8 John. 566.



**Answer.** Although the Lords expect that parties should conform to the standing orders, yet, when circumstances manifestly require they will dispense with them; as where by reason of sickness or other inevitable accident, the agent has been prevented from presenting an appeal, or the respondent from filing his answer within the limited period; and so, in all cases, where there has been no wilful neglect, provided it can be made to appear that no inconvenience is likely to accrue from refusing the indulgence (1) but in these cases an order must be obtained to dispense with the standing order, upon a petition for that purpose.

**Dispensation, how obtained.** This petition is to be moved by a peer, upon which occasion the agent must attend the House; for, in these cases, he is called to the bar and examined by the House as to the allegations of the petition, and sometimes, he is sworn to the truth of them.

Petitions of this description, however, are now generally referred to the Lords' Committees of Appeals (d).

On being served with the order to answer, the respondent should instruct an agent to apply at the Parliament Office and bespeak an office copy of the appeal; and, if the respondent wishes to expedite the hearing, he may, on having notice that an appeal is intended, and, without waiting till the order of summons is served, or the time for answering expired, put in his answer.

**Answers.** Answers are of two kinds, one general, the other special.

**General.** A general answer is in the following form:—

*"The answer of C. D. respondent, to the petition and appeal of A. B. appellant.*

*The respondent, not confessing or acknowledging all or any of the matters and things in the said petition and appeal mentioned to be true as the same are therein set forth, and reserving to himself all benefit and advantage of exception to the errors, defects, and imperfections in the said appeal contained, for answer thereunto saith, he admits that the Court of Chancery (or the Court of Chancery in Ireland) did make such decree or order, as in the said petition and appeal is (or are) mentioned and complained of, but as to the date and contents of such decree (or order) the respondent, for greater certainty, refers to the said decree (or order) when the same shall be produced; but the respondent is advised, and humbly apprehends, that the decree (or order) complained of, is agreeable to*

(d) Palmer's Prac. H. L. 31.

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(1) Ante, 1635-6, note

ity and justice, and, therefore, humbly hopes the same will be Answer.  
 ved and the appeal dismissed with costs.

E. F., agent for the respondent," (1).

sometimes happens that the respondent determines to bring a Where there is  
 appeal, in which case the answer should be qualified thus, a cross appeal.  
 at the said decree, so far as the same is complained of by the  
 petition and appeal, is agreeable to Equity," &c.

a answer is *special*, when particular facts are stated, or some Special ;  
 ific matter is alleged, either upon the merits of the cause, or  
 any defect in form in the appeal ; such as that there are not  
 er parties ; or that the decree or order appealed from did not  
 me final, but remains under review or rehearing ; or that the  
 or purport of the decree or order is erroneously stated in the  
 al. But special answers have not for a long time been deemed  
 sary nor used in practice, and in fact, the matters here no-  
 are more properly grounds for an application to the House to  
 iss the appeal for irregularity, of which we shall speak here-  
 . It is, therefore, of little use to the respondent to point out  
 ctions by his answer ; and the more general the answer is the  
 r, especially as any errors or defects pointed out by a special  
 er, can be amended by application to the House : so that, in  
 , they would only be productive of expense and delay.

swers are engrossed on parchment, and then lodged in the How put in.  
 ment Office, when the clerk marks on it the day it is brought  
 cording to a Standing Order of the 5th of April, 1720 (e),  
 hich it is " Ordered, that, when any answer to an appeal shall  
 it in for the future, the clerk, to whom it shall be delivered,  
 mmediately indorse thereon, the day on which such answer is  
 ght in, and that the names of the parties answering, and to  
 e appeals such answers are put in, be, the same day, entered  
 e Journals of the House" (f).

some cases both parties are dissatisfied with the determination Time for cross  
 a Court below, and the respondent as well as the appellant is appeal.  
 ed to prefer a cross appeal ; the time allowed for bringing in  
 is limited by the Standing Order of the 8th March, 1763 (g),  
 e week after answer put in to the original appeal, after which  
 me will not be received. If the time limited by the last re-

Lords' Journ. 1720.

Palmer's Prac. H. L. 33.

(g) Lords' Journ. 1763.

**Cross Appeals.** cited Order for presenting a cross appeal be elapsed, the House, on petition, will grant leave to present it *nunc pro tunc*, if good cause can be shown for the omission (*h*).

Leave to  
present *nunc  
pro tunc*.  
**Form of cross  
appeals.**

A cross petition-of appeal is, in form, the same as an original appeal, except that it must be entitled, "The petition and cross appeal," &c., and should specify the particular part of the decree or order of which the petitioner complains. It is presented and moved, and an order made upon it, in the same manner as upon an original appeal.

**No recogni-  
zance necessa-  
ry upon.**

The Order of the 27th of January, 1719, is silent as to recognizances for costs in cross appeals. It is said that, formerly, they were sometimes entered into, but they are not now required. Cross appeals must, however, be signed by counsel, although that is not expressly directed by the Order of the 3rd of March, 1697 (*i*).

**Order to  
answer.**

The order, to answer a cross appeal, may be served in the same manner as the order in an original appeal; but the respondent in the cross appeal being appellant in the original appeal, *et e contra*, by which both parties are in Court, service of the order upon the agent of the respondent in the cross appeal is sufficient (*k*).

**Answer**

The answer to a cross appeal is in the same form with that to an original appeal, except that the title is, "The answer of A. B. to the petition and cross appeal of C. D.," and that, towards the end, instead of saying, "That the decree, &c., is just," &c., it should be "That the decree, *in so far as is complained of by the said C. D.* is just and agreeable to Equity," &c. (*l*).

**Where session  
determines  
before time for  
answering.**

In case the session ends before the time limited for answering an appeal expires, this circumstance is provided for by the following Standing Order:

"28th of March, 1735 — It is ordered, that when upon an appeal to this House, an order shall be made for the respondent to answer by a time limited, if the session of Parliament wherein such order shall be made, shall determine before the time so limited for answering shall be expired, and no answer shall be put in during the same session, service of such order upon the respondent, five weeks before the first day of the then next session, shall be deemed good service, and the appellant may apply for a peremptory day, in case the respondent shall not put in his answer within three days from the first day of the next session of Parliament" (*m*).

**Effect of pro-  
rogation or  
dissolution.**

Formerly some doubts and questions arose as to the effect of prorogations and dissolutions of Parliament, and whether the ju-

(*h*) Palmer's Prac. H. L. 34.

(*l*) Ibid.

(*i*) Ibid.

(*m*) Palmer's Pr. H. L. 36; Lords

(*k*) Palmer's Prac. H. L. 34.

Journ. 1735.

dicial as well as legislative proceedings of the Lords were not thereby determined; in consequence of which, it has been determined, "that in all cases of appeals and writs of error, they continue and are to be proceeded on in *statu quo*, notwithstanding a prorogation or dissolution of Parliament" (n).

Dismissal for want of Prosecution.

By a Standing Order of the 5th of April, 1720, it is — "Ordered, that all such appeals as shall be presented in any session, to which answer shall be put in during the same session, and for hearing whereof no day shall be appointed in such session, if neither the appellant nor respondent shall apply to this House within eight days, to be accounted from the first day of the next meeting of Parliament, for a day of hearing, such appeals shall stand dismissed, but without prejudice to the appellants presenting any new appeals thereafter." It is also — "Ordered, that all such appeals as shall be presented in any session to which no answer shall be put in during the same session, if neither the appellant, within eight days from the first day of the next meeting of Parliament, shall apply to this House to appoint a peremptory day to answer, nor the respondent put in an answer within the said eight days, such appeals shall stand dismissed, but without prejudice to the appellant's presenting any new appeals thereafter" (o) (1).

Dismissal of appeals for want of prosecution.

The House of Lords will permit a petition of appeal to be amended after it has been presented (p); thus if any error is discovered in the petition, or if the appellant is advised that some previous orders are so connected with the order appealed from, that it will be impossible to do justice to his case without extending his appeal to these former orders, he should apply for liberty to amend his appeal (q).

Amendment of petition.

To obtain leave to amend, a petition must be presented, of which two days' notice in writing is to be given to the opposite agent, and it should be accompanied by a copy of the petition.

Application for leave to amend.

On the moving of this petition, it will be proper for the agents, on both sides, to attend the House, in order to answer any question which may be asked by their Lordships; and, lest the adverse agent should not attend, the petitioner's agent should be

(n) Palmer's Prac. H. L. 37.

(p) Ibid.

(o) Palmer's Pr. H. L. 38; Lords' Journ. 1720.

(q) Bouchier v. Dillon, 5 Bligh, N. S. 714.

(1) Where an appeal has been regularly taken from an interlocutory decree, mere delay in the prosecution of it is not a ground for its dismissal. *Dey v. Walton*, 2 Hill, (N. Y.) 403.

Nor is it ground for dismissal, that the appellant has omitted to give notice of an order to answer the appeal. *Dey v. Walton*, 2 Hill, (N. Y.) 403.

Setting down, prepared to prove, at the bar of the House, the service of the notice and petition.

These petitions, however, are usually referred to the Appellate Committee.

may be made by respondent. Applications to amend are not confined to the appellant, but may also be made by the respondent, who is interested in seeing that all the proceedings are correct, except that the respondent's petition should pray — "That the appellant may be ordered to amend his appeal in the particulars set forth, and to amend the respondent's copy."

Of new answers. If an appeal be amended after the respondent has put in an answer, and it is considered necessary that a new answer should be put in to the amended appeal, he must obtain an order for leave to withdraw the former answer, and put in a new one, in which case the respondent will be entitled to costs.

Of withdrawing and dismissing appeal. An order to this effect may be obtained on petition; but if the respondent do not voluntarily apply for such an order, and put in his answer, the appellant may proceed against him by a new peremptory order, and may get the cause set down *ex parte*, as already mentioned (r) (1).

Of withdrawing appeals. If the appellant finds it expedient to withdraw his appeal, he must obtain leave of the House to do it by petition; of which two days' notice must be given to the respondent's agents, as in other cases, and a copy of the petition also served; but the House will not grant the prayer of it without ordering the appellant to pay the respondent his costs, nor in some instances without the consent of the respondent's agent; for there may be cases in which it would be unjust to permit the appellant to withdraw his appeal, and thereby leave him at liberty, at a considerable distance of time afterwards, to bring a new appeal, which he might do notwithstanding the withdrawing of his former appeal (s).

Of counter petition to dismiss appeals improperly brought. In case an appeal should be presented, which the respondent has reason to think is irregular, a counter petition should be presented praying to have it dismissed (2), and the respondent's agent must give two days' notice to the appellant's agent, of his intention, and should, at the same time, serve him with a copy of the

(r) Palmer's Prac. H. L. 42.

(s) Palmer's Prac. H. L. 43.

(1) See 13th Rule in Chancery, New York.  
If the appeal is made after the time allowed for appealing, the objection should be taken by motion to dismiss the same; and it cannot be taken at the hearing. Answering is a waiver of objections of a formal nature. *Disbrow v. Henshaw*, 8 Cowen, 353; *Rogers v. Cruger*, 3 John. 564.

(2) See *Halsey v. Van Amringe*, 4 Paige, 279.

petition, and both agents should attend on presenting it; on which occasion (unless there shall manifestly appear to be some palpable breach of the standing orders of the House, or of the legislative enactments respecting appeals, in which case the appeal will be dismissed at once), the petition will be referred to the Appeal Committee, before which the agents and counsel, if desired, will be heard (t); in questions of great importance, however, the arguments have been heard at the bar of the House (u).

Setting down  
reviving, &c

It is to be observed here, that if an irregular plea is presented, the counter petition should be presented before the original appeal is answered, for if the respondent treats it as an effective appeal, by answering it before he presents his counter petition, he will not be entitled to costs (x). The usual course of the House, upon such a counter petition being presented, is to refer the petitions to the Appeal Committee, but upon questions of importance they will be directed to be argued at the bar by counsel (y).

Within what  
time.

After the answer is put in, either the appellant or respondent may apply to the House, by motion, to have the appeal appointed to be heard. Of setting down appeal for hearing.

It sometimes happens that there are two appeals which relate to the same subject, or in which the questions in both are similar, and that one of them has been set down, so as to stand several causes before the other: in such a case, the House, upon a petition, will order the second to stand next to the first (z).

By an Order of June the 8th, 1749, "It is ordered, that all such appeals as have been presented, for hearing whereof days shall be appointed in any session, which shall not be determined in the same session, shall be heard and determined in the beginning of the next session, in the same order as they stand to be heard at the end of this or any future session, without any new application to appoint a day for hearing the same" (a).

It frequently happens that the appellant or respondent dies before the hearing of the cause, in which event the appeal must be revived by petition to the House, in the name of the deceased party's heir or personal representative, or both, as the occasion may require, and supplemental cases delivered. This is regulated by the Standing Order of the 20th of March, 1823:—"Whereby it is ordered that where any parties to an appeal shall die, pending the same, subsequently to the printed cases having been de-

Of reviving  
appeals.

(t) Ibid. 44.


(u) Norbury v. Meade, 3 Bligh, 274.

(z) Ibid.

(y) Ibid.

(z) Palmer's Prac. H. L. 46.

(a) Palmer's Prac. H. L. p. 48.

**Printed Cases.**  delivered, and the appeal shall be revived against the representatives, a supplemental case shall be delivered by the parties ~~so~~ <sup>n</sup> giving the same, stating the order or orders made by the House in such case.

“ And the like rule shall be observed by the appellant and respondent where parties in the Court below have been omitted in the appeal, and shall, by leave of the House, be added as parties to the appeal after the delivery of the printed cases.”

**Printed cases;** For the better information of the Lords as to the matters in controversy, printed statements of the appellant's and respondent's cases are usually delivered to them, which cases, before they are printed, must be signed by counsel.

**Contents of;** The cases should contain all the material facts, and should concisely narrate the proceedings, and the substance of the pleadings and evidence or proofs, whether consisting of documents or depositions, and particularly those on behalf of the party whose case it is. By an Order of the 24th day of February, 1813, it is “ Ordered, that the printed cases delivered in appeals and writs of error depending in the House, shall contain a copy of so much of the proofs taken in the Courts below, as the parties intend to rely on at the hearing, together with reference to the documents where the same may be found ” (b).

**House may hear proofs which have been omitted.** But although the preceding Order directs that the parties shall print the proofs they mean to rely on, it was said, by Lord Eldon, “ That the rule was made by the House for the purpose of guarding itself, but that it is competent to the House to hear evidence not printed, if it thinks proper. The parties are to print what they think material: but, in such a case as that, it was too much to suppose that any one could infallibly say what was and what was not material ” (c).

**Signature of counsel.** By the standing Order of the 19th of April, 1698, for preventing scandalous and frivolous printed cases being delivered to the Lords, it is ordered that no person whatever do presume to deliver any printed cases to any Lord, unless such case shall be signed by one or more of the counsel, who attended the hearing in the Court below, or shall be of counsel at the hearing in this House (d). But, although the order expresses that the case may be signed by one or more counsel, the usual course is to have them signed by two (e).

(b) Lords' Journ. 1813.

Prac. H. L. 53.

(c) 4 Dow. 222.

(e) Ibid.

(d) Lords' Journ. 1698; Palmer's

When the case has been signed by counsel, there are commonly 500 copies printed off, and usually a dozen of them are printed in fine large paper, for the use of the parties' own counsel and agent, and to exchange with the adverse agent for him and his counsel. This large number is necessary, because it is customary to send 350 copies to the Parliament Office (f). Printed Cases.  
Number of  
copies.

Formerly, by a Standing Order of the 12th of January, 1724, Of delivering the printed cases to the Clerk of the Parliaments, to be distributed to the Lords, the printed cases, at least four days before the hearing; but this is now regulated by an Order of the 12th of July, 1811: — "Whereby it is ordered, that, when any appeal shall be presented on or after the first day of a session, the appellant and respondent shall, severally, lay the prints of their cases upon the table of the House, or deliver the same to the Clerk of the Parliaments, *within a fortnight after the time appointed for the respondent to put in his answer*: and in default of so doing by the appellant, the said appeal shall stand dismissed, but without prejudice to his presenting a new appeal within the first fourteen days of the next session of Parliament, or within the then remainder of the time limited by the Standing Order, No. 18 (13th July, 1678), for presenting appeals; and, in case of default on the part of the respondent, the appellant shall be at liberty to set down his cause *ex parte*" (g).

If, through any casualty, either of the parties' agents should be prevented from getting his case prepared in time to lay the prints on the table, pursuant to the Standing Order, he must present a petition for a further day, setting forth the cause of delay (h). Time for,  
how enlarged.

"In consequence of the great inconvenience arising by petitions for putting off causes, after days having been appointed for hearing thereof, it is ordered, that when any day shall be appointed for hearing any appeal or writ of error, the same shall not be altered but upon petition; and that no such petition shall be received, unless two days' notice thereof be given to the opposite party; of which notice, oath shall be made at the bar of the House" (i).

There may be many reasons for the postponement of a hearing besides that of not being prepared with the case, such as, that the agent has not received money to fee counsel; that copies of the proceedings, in Irish causes, have not been received; or that some material deed or instrument, exhibited in the Court below, On what occasions postponed.

(f) Palmer's Prac. H. L. 56.

(g) Lords' Journ. 1724.

(h) Ibid. 1811. Vide *Way v. Foy*, 18 Ves. 452, where the object of this

Order is stated by Lord Eldon; ante, p. 159.

(i) Lords' Journ. 22d Dec. 1703.



- Postponement of.** has not been furnished ; or that some essential paper or evidence is withheld by a person interested, or that papers are retained by a former agent, who holds them for his bill of costs, so that they cannot be obtained without an order from the House. In any of these cases, the House, upon petition and proof in support of it, will, if it thinks fit, make an order to postpone the hearing ; and, in the last-mentioned case, will also make an order upon the person in possession of such papers, to produce or deliver the same to the appellant or respondent, to be used on the hearing, but to be afterwards returned ; or else that such documents shall be deposited with the clerk in the Parliament Office, which, indeed, seems to be the most proper course. To this end the petition must be presented to the House, and notice of it, with a copy of the petition, served on the party personally, if possible, two days at least, before presenting it ; and a longer notice, according to the distance of the party's residence (*k*).
- Production of papers by former agent, how enforced.**
- Petition for, &c.**
- Abatement and revivor.** It was at one time considered absolutely necessary, when a suit abated after the appeal presented, to revive the cause in the Court below, before the appeal could be revived ; but a different opinion, as well as practice, now prevails ; and the order of the House gives no directions to revive the cause in the inferior Court. In the case of *Thorpe v. Mattingley* (*l*), one of several defendants died pending an appeal to the House of Lords, and the House of Lords having admitted his representatives on that petition as parties to the appeal, eventually made an order varying the decree below, and dismissing the bill as against that defendant with costs ; whereupon it was held, that the order of the House of Lords, might be made an order of the Court below, without first reviving the suit.
- When, however, the abatement takes place before the appeal has been presented, it is the better way to revive first, and to make the representatives parties to the appeal (*m*).
- Order to revive.** Upon a petition being presented, the House will make an order to revive the proceedings, and they will then go on as if the original appellant were living.
- The supplemental case, which is directed by the Standing Order of the 20th of March, 1823, may be very short ; merely stating the title of the appeal, the different facts set forth in the petition, and the order for the revival of the appeal ; which case will not require the signatures of counsel, unless it contains arguments or observations ; if it should, then it must be signed by counsel. It
- (*k*) *Palmer's Prac. H. L.* 59.                      (*m*) *Palmer's Prac. H. L.* 59.  
(*l*) 1 Ph. 200 & 443, S. C.

must be printed and indorsed as the original case, and a sufficient number lodged at the Parliament Office (n). Abatement  
and Revivor

The order, it will be observed, also directs that supplemental cases shall be delivered, where parties in the Court below shall have been omitted, and shall, by leave of the House, be added as parties to the appeal, after the printed cases have been delivered (o). Where new  
parties added

By the Standing Order of the 2nd of March, 1727, only two counsel on each side can argue ; but in cases of great importance and complication, it is not uncommon to call in a junior or third counsel for consultation and assistance (p). Number of  
counsel.

Though by the Standing Order only two counsel on a side are to be heard, which is founded on a supposition that there are but two parties or sets of parties interested ; yet where it appears that the respondents have not identical, but separate, and perhaps conflicting interests, the House will allow a third or additional counsel in support of such interests. To obtain leave to do so, it is usual to present a petition for that purpose, stating the peculiar circumstances. An instance of this occurred in the appeal of *Gore v. Stackpole*, in which their Lordships made an order, that an infant respondent might have counsel on his separate behalf (q). Of additional  
counsel.

The mode and order of proceeding at the hearing is regulated by the Standing Order of the 2nd of March, 1727, above referred to, whereby it is ordered, that, at the hearing of causes, one of the counsel for the appellants shall open the cause ; then the evidence on their side shall be read (r), which done, the other counsel for the appellants may make observations on the evidence ; then one of the counsel for the respondents shall be heard, and the evidence on their side be read ; after which, the other counsel for the respondents shall be heard, and one counsel only for the appellants to reply (s). Of the hearing.

When the arguments of counsel are finished, they withdraw from the bar, and the House, if then prepared, give their judgment, affirming the decree or order of the Court below, with or without costs ; or reversing or varying the same, according to the circumstances of the case. If any Lord conceives that the decree or order is erroneous, he states his reasons, and moves that it be reversed or varied : and should the rest of the House be of that Of the judgment.

(n) Palmer's Prac. H. L. 82.

(o) Ibid.

(p) Lords' Journ. 1727 ; Palmer's Prac. H. L. 14.

(q) 9th May, 1812, Palmer's Prac.

H. L. 14.

(r) As to reading evidence upon appeals to the House of Lords, vide post.

(s) Palmer's Prac. H. L. 68.

**Hearing.**

opinion, the motion is put and carried; but if it be opposed, then a debate ensues, and the question is put to the vote, on which occasion *proxies* are not allowed; and it being the rule of the House to put the question for reversing (t) the decree or order, unless, upon a division, there is a majority for the reversal, it will be affirmed (1).

**In what cases necessary to make it an order of the Court below.**

On some occasions, the House, instead of affirming or reversing the judgment, gives directions to the Court below to rectify its judgment; in such cases, the order of the House of Lords must be made a rule or order of the Court of Chancery (u). So also it must be, if the House of Lords reverse the decree of the Court, because it may otherwise be carried into execution. In *Attorney-general v. Scott* (z), where a decree of the Court of Chancery was affirmed by consent, an application was made to the Court, to make the judgment an order of the Court of Chancery, but Lord Hardwicke doubted whether such a thing was ever done; nor indeed can it under any circumstances be necessary, where a decree is simply affirmed, unless the proceedings under it have been suspended, pending the appeal.

**In what manner made an order of the Court.**

An order, to make a judgment of the House of Lords upon an appeal, a rule or order of this Court may be obtained as of course on motion, upon production of the order signed by the Clerk of Parliament (y).

**Costs, in what manner settled.**

It is to be observed, that the House of Lords possesses no officer to whom the taxation of costs can be referred; it is therefore usual to name a specific sum in the judgment, as the amount of costs to which the party to have them is entitled. This sum is usually settled by the agents on both sides; but if the agents cannot agree on the amount of the costs, as often happens, as there is no officer belonging to the House authorized or competent to tax them, if the sum demanded should appear to their Lordships to be unreasonable, they will order the bill to be referred to some agent or solicitor agreed on by both sides (z). The House, also, has sometimes called in the assistance of a Master in Chancery, to determine what the amount ought to be; but this has been con-

(t) By a Standing Order of the 14th of Jan. 1694, upon giving judgment in cases of appeal or writs of error, the question shall be put for *reversing* and not affirming the judgment of the Court below.

(u) *Atty.-Gen. v. Scott*, 1 Ves. 419.

(z) *Ubi supra*.

(y) 2 Harr. Ch. P. 351; *Seton* on Dec. 392 (n.) 2; vide etiam, *Hand's* Prac. 124; *Equity Draftsman*, 625.

(z) *Palmer's* Prac. H. L. 74.

(1) See *Bridge v. Johnson*, 5 Wendell, 371.

sidered only as putting in force the recognizance, and not as a taxation, independent of that, by virtue of any inherent authority possessed by the House (a). Judgment.

When costs are awarded to the respondents on the affirmance of a decree or order appealed from, the order dismissing the appeal, with costs, should be served on the appellant personally; and if the recognizance was entered into by any other person, the order, also, should, in like manner, be served on him, and the costs demanded of each by the person to whom they are ordered to be paid, or some person by him deputed, by power of attorney, to receive them. It will be proper to serve the order, also, on the agent. Service of order.

In case of non-payment of the costs, the respondent petitions the House that the party may be compelled to pay to him the sum of £ ——— ordered to be paid to him as costs. When this petition is presented, the respondent must be prepared to prove, at the bar of the House, the personal service of the order, and the demand and refusal of the costs. The House may then either order the parties into custody, for the contempt (a), or direct the recognizance to be estreated into the Exchequer, which latter is the usual mode (b). Payment of how enforced  
Costs.

Before quitting the subject of appeals to the House of Lords, it is right to mention that a material distinction exists between them and rehearings in the Court below, with regard to evidence. We have seen (c), that, upon the rehearing of a cause before the Lord Chancellor, by way of appeal, the reading of evidence, not read in the Court below, is, under certain restrictions, permitted; in the House of Lords, however, this principle universally prevails, that no evidence can be received which was not laid before the Court below, nor can any evidence, which was received below, be objected to above, unless the admission of improper evidence be among the points of appeal (d). Of evidence upon appeals

It may be mentioned also, that where evidence has been rejected below, which the House thinks ought to have been received, the usual course is to remit the cause to the Court below; it

(a) *Ex parte Wheeler*, 3 V. & B. 21.

(e) As was done in the case of Mr. Carey, Lords' Jour. 21st of March, 1717-17, Harg. Pref. 208; but this is hardly ever done now.

(b) *Palmer's Prac. H. L.* 73.

(c) *Ante*, p. 1628.

(d) *Eden v. Earl Bute*, 1 Bro. P. C. ed. Toml. 465; and vide *Baesh v. Moore*, 3 Bro. P. C. 546; and *Button v. Price*, Prec. in Cha. 212.

Judgment. seems, however, that before doing this the House of Lords look at the rejected evidence in order to see whether, if it were admitted, it would affect the opinion of the House in forming the judgment (e).

(e) *M'Cabe v. Hussey*, 5 Bligh, N. S. 715, 729.

## CHAPTER XXIX.

### OF SUPPLEMENT AND REVIVOR.

#### SECTION I. — *Supplemental Bills.*

In the preceding Chapters, the attention of the reader has been directed to the rules and course of proceeding in a suit originally perfect in its frame, and in which no incidental circumstances have occurred to alter the state of the original parties, or the relation in which they stood to each other, at the commencement of the proceeding. In a suit in Chancery, however, which frequently embraces a variety of matters, and affects the interests of many parties, it often happens that the suit, though perfect in its institution, has, by some event subsequent to the filing of the original bill, become defective, or has abated, so that no proceeding can be had, either as to the whole or some part; or it may happen that there is some imperfection existing in the frame of the original bill, which was not discovered in time to allow of its being corrected by amendment. When such is the case, the rules of the Court furnish means of supplying the defect, by permitting the exhibition of what are termed supplemental bills, and bills of revivor, the former of which are applicable to cases in which the defect was either in the original proceeding or has been occasioned by some event subsequent to the institution of the suit, so that the proceedings, as they stand, cannot have their full effect; the other being applicable, where, by some subsequent event, there is no person by whom or against whom the suit in the whole or in part can be prosecuted (a) (1).

There are also other bills known in practice, which, though they are not strictly supplemental bills, or bills of revivor, strongly resemble them as well in form as in the practice consequent upon

Methods of  
supplying de-  
fects in suits,

Different  
kinds of bills.

(a) Lord Red. 66.

(1) Story Eq. Pl. § 323.

To supply Defects in original Bill. them; bills of this description are generally termed "bills in the nature of supplemental bills," or "bills in the nature of bills of revivor."

In some instances, the abatement of the suit gives rise to new matters which it becomes necessary to introduce into the proceedings, in which cases the proper remedy is by bill of revivor and supplement.

By a supplemental bill.

A supplemental bill may be necessary to remedy defects in a suit, either existing at the time when the original bill was filed or which have since occurred in consequence of the birth of new parties or a change in the interests of those originally on the record (1).

Not allowed where it can be done by amendment,

"Where the imperfection of a suit arises from a defect in the original bill, or in some of the proceedings under it, and not from any event subsequent to the institution of the suit, it may be added to by supplemental bill merely (b)." Nothing, however, which occurred prior to the filing of the original bill, ought to be added by way of supplement, unless the state of the cause is such that an amendment can no longer be obtained; but when the original bill cannot properly be amended, as where witnesses have been examined and publication passed, then any new matter necessary to be put in issue can be introduced only by supplemental bill (c): upon this ground, where, after publication had passed and the cause set down, the statement of a will was introduced into the original bill, in order that the opinion of the Court might be taken upon the construction of it, Lord Hardwicke, at the hearing, considered the introduction of the will into the original bill by amendment, after publication passed, as irregular; nevertheless, he ordered the case to stand over, and the plaintiff to be at liberty to bring the will regularly before the Court, by supplemental bill or otherwise, as he should be advised (d) (2).

(b) Lord Red. 61.

370.

(c) Goodwin v. Goodwin, 3 Atk.

(d) Ibid.

(1) A supplemental bill, when properly before the Court, is an addition to the original bill, and becomes part of it, so that the whole bill is to be taken as one amended bill. *Gillett v. Hall*, 13 Conn. 426.

(2) Story Eq. Pl. § 333.

In *Pedrick v. White*, 1 Metcalf, 76, it was held that to warrant the filing of a supplemental bill, it should be shown to the Court, either 1st, That the matter, relied upon as supplemental, arose after the original suit was commenced; or, 2nd, That the facts relied upon first came to the plaintiff's knowledge, or were made known to him in such a manner, that he could avail himself of them, after the cause had passed the stage in which he might have had leave to amend; or 3rd, That the plaintiff has been prevented, through inadvertence, misapprehension, &c. of himself, his agents or counsel, or other

It must not be considered, however, that if a plaintiff, who has omitted to pray proper relief by his bill, and has not stated a case sufficient to procure an extension of the relief prayed under the prayer for general relief, will, at the hearing, be permitted to file a supplemental bill for the purpose of remedying the defect. Thus, where the plaintiff, an annuitant, filed a bill as a specific incumbrancer, but omitted to pray relief as a general creditor, to which he was entitled under his security, and, upon the death of the original defendant, revived the suit, but did not avail himself of the opportunity to extend the relief by supplemental bill, Sir Anthony Hart, although he thought that, if the suit had been properly framed, the plaintiff would have been entitled to relief as a general creditor, or if a case for it had been made by the bill, which it was not, might have claimed such relief under the prayer for general relief, refused to cure the defect by straining the decree, nor would he give liberty at that period to add any thing to the record by way of supplement (e).

To supply Defects in original Bill  
Nor where bill has omitted to pray proper relief.

The cases do not establish any very clear principle concerning the period of the cause when the plaintiff may, without leave, file a supplemental bill for the purpose of introducing matter which existed at the time when the original bill was filed, but which was not discovered till afterwards. In *Colclough v. Evans* (f), an attempt was made, after replication, to evade the necessity of obtaining special permission to amend, by filing a supplemental bill, the object of which was to put in issue, and obtain a discovery of, facts and documents, which, if the record could have been amended, might have been introduced by amendment, but which, it was alleged, were not known to the plaintiffs till after the original suit was at issue; but the V. C. of England, upon demurrer, held that such a bill could not be sustained, as it would be permitting the plaintiffs to do indirectly what the Orders intend should not be done; except upon special leave; he, therefore, allowed the demurrer, but without prejudice to the plaintiffs' making such application, to withdraw the replication and amend their original bill, as they might be advised (1).

Of the introduction by supplemental bill, of what might have been made the subject of amendment.

(e) *Field v. Delaney*, 1 Mol. 174. (f) 4 Sim. 76.

cause satisfactorily shown, from availing himself of the proposed matter of his supplemental bill, at an earlier stage of the cause. See *Candler v. Pettit*, 1 Paige, 168; *Stafford v. Howlett*, 1 Paige, 201; *Welf. Eq. Pl.* 188.

(1) See *Story Eq. Pl.* § 333, note; *Dias v. Merle*, 4 Paige, 259.

A supplemental bill, introducing new facts relating to the merits, ought not to be filed, as a matter of course, but only by leave of the Court, upon sufficient cause shown. *Tappan v. Evans*, 12 N. Hamp. 330; *Pedrick v. White*, 1 Metcalf, 76; *Eager v. Price*, 2 Paige, 333; *Lawrence v. Bolton*,



To supply Defects in original Bill.

Whether the fact of its changing the issue renders supplemental matter inadmissible.

Amendment now allowed after replication.

Of the introduction of matter posterior to original bill.

It is to be remarked, that, in the above case, the supplemental bill sought to change the issue raised by the original bill between the parties, and to make a new and different case; and that, in a subsequent case (*g*), where that was not attempted, and the only object of the supplemental bill was, without varying the case or the relief sought, to bring before the Court matter discovered since the original bill, which would have concluded the defendant, the same learned Judge, upon demurrer, held that the bill might be sustained. Lord Cottenham, however, appears to have expressed a doubt as to the correctness of the distinction drawn by his Honor; but the case did not call for any direct decision by him upon the subject (*h*).

It may be observed, that the 67th and 68th Orders of May 1845 (*i*), define the affidavits upon which a plaintiff can now apply for leave to amend after replication. Consequently there does not now seem to be any reason why a plaintiff should, before publication, be permitted to introduce by supplemental bill matter properly the subject of amendment. The general rule, according to Lord Redesdale, being, that "wherever the same end may be obtained by amendment, the Court will not permit a supplemental bill to be filed" (*k*).

Matters which have occurred since the original bill was filed, and which are material to perfect the plaintiff's case, may also be introduced into the record by supplemental bill (*l*). Thus where

(*g*) *Crompton v. Wombwell*, 4 *gers' Company*, 4 M. & C. 1.

Sim. 628. (*i*) *Ante*, p. 475-6.

(*h*) *Atty.-Gen. v. The Fishmon-* (*k*) *Lord Red.* p. 62.

3 Paige, 204. Such is the practice in New York relating to injunction bills at least. *Eager v. Price*, *Lawrence v. Bolton*, *ubi supra*. And it is said to be most safe to apply for leave in all cases. 1 Hoff. Ch. Pr. 403.

On an *ex parte* application for leave to file a supplemental bill, the Court examines the question so far as to see that the privilege is not abused for the purposes of delay and vexation to the defendant. *Eager v. Price*, 2 Paige, 333. In a doubtful case the Court may direct notice to be given of the application to the defendants, who have appeared. *Ib.* The application may be made either by motion or petition. A bill of this nature ought to be filed as soon as the new matter sought to be inserted therein is discovered. And if the party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review, founded on such facts. *Pendleton v. Fay*, 3 Paige, 204; *Story Eq. Pl.* § 338 a. If such bill is filed without any sufficient grounds, the defendant must make the objection by plea, answer, or demurrer. *Lawrence v. Bolton*, 3 Paige, 294; *Fulton Bank v. New York and Sharon Canal Co.* 4 Paige, 127. A supplemental bill may be filed after publication is passed. *North Amer. Coal Co. v. Dyett*, 2 Edw. 115; *Pleasants v. Logan*, 4 Hen. & Munf. 489.

(*l*) *Story Eq. Pl.* § 335, § 336, and note; *Greenleaf v. Queen*, 1 *Peters*, 148; *Candler v. Pettit*, 1 Paige, 168; *Stafford v. Howlett*, 1 Paige, 200.

a plaintiff has an inchoate right at the time of filing his original bill, which merely requires a formal act to complete it, which is not performed till afterwards, such formal act may be brought before the Court by supplemental bill, as in the instance of an executor or administrator filing a bill before probate or administration taken out; in such a case, the fact of the probate or administration having been granted, may be introduced by amendment, but if the record is not in a state to admit the amendment, it may be introduced as well by supplemental bill (1) (1).

To supply defects in original Bill

Where plaintiff has an inchoate right which he afterwards completes.

The reader is to be reminded, that a plaintiff cannot support a bad title, by acquiring another after the filing of the original bill, and then bringing it forward by supplemental bill (2): thus in *Tonkin v. Lethbridge* (m), where the plaintiff filed his original bill to redeem a mortgage as heir at law of the original mortgagor, and upon an issue directed, was found not to be heir; but in the meantime, he had bought in the interest of a third person who claimed to be heir, and had amended his bill by stating that fact, and upon the issue being found against him, he filed a supplemental bill stating the purchase, and praying that he might be declared entitled to the redemption and conveyance prayed by the original bill. To this supplemental bill the defendant demurred, "because it did not appear by such supplemental bill, that any new matter had arisen since the filing of the original bill in the cause, which was properly matter of supplement, and the demurrer was allowed."

Supplemental matter cannot be introduced to support a bad title.

(1) *Humphreys v. Humphreys*, 3 Wms. 508. (m) *Cooper's Rep.* 43.

(1) When any event happens subsequently to filing an original bill, which gives a new interest or right to a party, it should be set out in a supplemental bill. *Saunders v. Frost*, 5 Pick. 276. A supplemental bill must follow the original complaint and set forth actual and subsequent damages arising from the same cause set forth in the bill. *Bardwell v. Ames*, 22 Pick. 375; *Story Eq. Pl.* § 336, § 339.

An original bill cannot be amended by incorporating any thing therein, which arose subsequently to the commencement of the suit. This should be stated in a supplemental bill. *Stafford v. Howlett*, 1 Paige, 200, 201.

A plaintiff cannot file a supplemental bill to introduce facts which have occurred since the filing of the original bill, and upon which a decree can be had without reference to the original bill. The plaintiff should dismiss his original bill and file an entirely new one. *Milner v. Milner*, 2 Edw. 114.

Wherever the Court, in a proper case, has given a party leave to file a supplemental bill, they will permit other matters to be introduced into the supplemental bill, which might have been incorporated in the original bill by way of amendment. *Stafford v. Howlett*, 1 Paige, 200, 201.

(2) *Byrne v. Byrne*, 1 Con. & Law, 139; *S. C.* 2 Dru. & War. 71.

If an original bill is wholly defective, and there is no ground for proceeding upon it, it cannot be sustained by filing a supplemental bill, founded upon matters which have subsequently taken place. *Candler v. Pettit*, 1 Paige, 168.

To supply Defects in original Bill.

Otherwise where there was an inchoate title.

By adding parties after order at the hearing,

ed ; Lord Eldon observing, that to entitle a plaintiff, by a supplemental bill, to the benefit of the former proceedings, it must be in respect of the *same title* in the *same person* as stated in the original bill." The same principle appears to have been acted upon by Lord Thurlow, in *Davidson v. Foley* (n), and by Lord Brougham, in *Pritchard v. Draper* (o).

It is, however, to be remarked, that it is only where the first title is absolutely bad, that a supplemental bill of this description will be improper ; where the plaintiff had originally a good inchoate title, which only required some formal act to make it perfect, as in the cases pointed out in a former part of this treatise (p), there the statement of such act by supplemental bill will be permitted. Thus in *Mutter v. Chauvel* (q), where the plaintiff claimed a right to the rents and profits of the benefice by virtue of a nomination by himself, under an equitable right to nominate, derived from his father's will, and filed his bill against the incumbent, and others who claimed the right of nomination in opposition to the plaintiff, for an account of such rents and profits from the time of his nomination, &c. ; and it appeared, upon the hearing, that a deed of release from his sisters to the plaintiff, which formed an essential part of the plaintiff's title to the right of nomination, was not executed till long after the filing of the bill, Sir T. Plumer, M. R. permitted the case to stand over, with liberty to the plaintiff to file a supplemental bill, for the purpose of regularly introducing the release from his sisters.

A supplemental bill, for the mere purpose of bringing parties before the Court, who ought to have been parties to the original bill, may be filed at any period of the cause (1) ; and it is not unfrequently the case, that where a cause, at the hearing, has been ordered to stand over, with liberty to add parties, it has been expressly directed, that they should be added by supplemental bill (r) ; though, even the ordinary direction on such occasion, that the plaintiff shall be at liberty to add parties by amendment, has been held to authorize the filing of a supplemental bill for that pur-

(n) 3 Bro. C. C. 598 ; and vide ante, 461, note (l).

(o) 1 R. & M. 191.

(p) Vide ante, p. 460.

(q) 5 Russ. 42 ; vide etiam, *Sadler v. Lovett*, 1 Moll. 162.

(r) *Jones v. Jones*, 3 Atk. 110.

(1) Where an objection, for want of parties, is made out of season, the plaintiff, instead of amending the original bill, may file a supplementary bill, merely to bring in the parties wanting ; and the defendants to the original bill need not, in such case, be made parties to the supplemental bill. *Ens-worth v. Lambert*, 4 John. Ch. 605 ; *Story Eq. Pl.* § 334, § 335.

pose (s). A supplemental bill may also be filed, for the purpose of bringing before the Court a party who was out of the jurisdiction when the original bill was filed, and who has since returned.

To supply defects in original Bill

It may be mentioned here, where a bill was filed on behalf of a great number of plaintiffs interested in an annuity, to recover the arrears, &c., and after the cause was at issue, and witnesses had been examined, it was discovered that one of the plaintiffs in whose name the bill was exhibited, had died before the filing of the bill; a supplemental bill was filed by the existing plaintiffs, and the representative of the deceased plaintiff, against the defendants, praying to have the same benefit of the proceedings in the original suit, that they would have been entitled to, had the plaintiff, who was dead, been alive when the bill was filed, and the decree was made in both suits (t) (1).

or where they have come within the jurisdiction.

Where some of the original plaintiffs in a cause were dead when bill filed.

A supplemental bill, for the purpose of adding new matter, or for bringing new parties before the Court, may also be filed after, as well as before the decree (2); thus where a defendant appealed from a decree of the Master of the Rolls, but before it was brought on, the plaintiff, apprehending, that he had not proper parties before the Court, when the decree was pronounced, to enable them to carry it into effect, filed a supplemental bill, for the purpose of bringing the necessary parties before the Court; to this supplemental bill the defendant demurred, but the demurrer was overruled (u).

After decree.

To enable plaintiff to carry it into effect.

So also, where, in consequence of the parties claiming the property in question, being some of a class, the Court refers it to the Master, to inquire who the individuals of the class are; and it turns out, upon the Master's report, that some of them are not before the Court, the plaintiff may file a supplemental bill, for the purpose of bringing them before the Court, before a final decision can be made (x).

After decree, where other parties are necessary.

In like manner a party in a bill for an account, may, after a decree, file a supplemental bill, for the purpose of bringing before the Court a party who was out of the jurisdiction when the original bill was filed, and who has since returned.

For the discovery of more evidence relating to account.

(s) *Greenwood v. Atkinson*, 5 Sim. 419.

(u) *Woodward v. Woodward*, 1 Dick. 33.

(t) *Delfosse v. Crawshaw*, MSS. Rolls, 12 November, 1834.

(z) *Ante*, p. 246-5.

(1) A supplemental bill may be brought on behalf of the defendant in the suit. Where the matter is newly discovered evidence on the part of the defendant after the cause is at issue, or after publication is passed, or even after a hearing or decree, the defendant may, by a petition to file a supplemental bill, obtain relief, and an order allowing him to introduce the new evidence, either by putting the new matter at issue, or by enlarging publication, or by a rehearing, as the particular stage of the cause, at which the discovery is made, may require. *Story Eq. Pl. § 337 a*; *Baker v. Whiting*, 1 *Story C. C.* 232, 233.

(2) *Story Eq. Pl. § 338*.

To supply De-  
fects in  
original Bill.

decree to account, file a supplemental bill for the discovery of more evidence touching the account; and where, to such a bill, the defendant pleaded the former bill, and that the cause was heard, and an account directed, he was ordered to answer to all matters in the supplemental bill not answered unto in the former case, but the plaintiff was not to reply or proceed any farther without order (y). A supplemental bill, however, will not lie after a decree for account, for the mere purpose of stating additional facts which arose before the filing of the original bill, and of praying that such matters may be taken into consideration in the account decreed to be taken (z).

To obtain di-  
rections not  
prayed by bill,  
but rendered  
necessary by  
proceedings  
under decree;

and not to be  
obtained by  
prayer for  
general relief.

A supplemental bill may, likewise, be filed after a decree, for the purpose of enabling the Court to give directions, which were not prayed by the original bill, but which the result of the proceedings under the decree have rendered proper. This was held by Lord Hardwicke in *Dormer v. Fortescue* (a). In that case the plaintiff filed his bill for a discovery of a deed under which he claimed, and that the same might be deposited for safe custody and produced at a trial at Law, and for general relief. At the hearing, the deed was ordered to be deposited, &c., till after the trial at Law. The plaintiff having been successful at Law, applied, when the cause came on for further directions, for an account of the rents and profits from the time his title accrued, which was resisted on the ground that the bill did not specifically pray an account of rents and profits, but only general relief; but Lord Hardwicke held that, under the prayer for general relief, the plaintiff was entitled to the account; his Lordship, however, added, "but suppose the original bill to be as defective as the defendant's counsel would have it to be, could any thing be more proper than to bring a supplemental bill to put this matter in issue and supply the defects, if any, in the original bill? Supplemental bills are often brought in aid of a decree of this Court, as in a decree to account, for want of full directions before: and directions are given, under the supplemental bill, that the new matter should be connected with the former decree" (b).

And here it may be mentioned, that although, in general, where, upon an injunction to restrain a piracy being dissolved, with liberty to the plaintiff to bring an action, upon the defendant's underta-

(y) *Boeve v. Skipwith*, 1 Eq. Ca. Ab. 80; 2 Ch. Rep. 142. bill of review supported by the usual affidavit, and apply to have the cause reheard.

(z) *Swan v. Swan*, 8 Price, 518. The plaintiff should, in such case, file a supplemental bill in the nature of a

(a) 3 Atk. 124.  
(b) 3 Atk. 124.

king to keep an account of the books sold, if the verdict is in favor of the plaintiff, the Court will, upon the hearing, under the prayer for general relief, direct an account against the defendant, without a supplemental bill, yet this is only where the plaintiff was in a situation to pray an account when the bill was filed; but if the plaintiff's right to the account is only consequent upon the defendant's undertaking to keep one, there must be a supplemental bill (c).

To supply Defects in original Bill.

So also, if the original bill has omitted to put in issue material matter, as where a bill charged a forgery in a lease and prayed to be relieved against it, but, by way of inducement only, mentioned that there were fraudulent circumstances attending the case, without making a charge of fraud distinct from the charge of forgery, or bringing before the Court the trustees, who were parties to the lease, and to whom the fraud was imputed, and a decree was made directing an issue to try the forgery, which the plaintiff failed in establishing, — when the cause came on again for further directions, the plaintiff sought to establish the case of fraud, which was objected to, because the fraud had not been distinctly charged in the bill, and Lord Hardwicke allowed the cause to stand over, (the plaintiff paying the costs of the day,) and permitted the plaintiff to bring a supplemental bill for the purpose of charging the fraud, and making the trustees parties (d).

To put in issue matter not sufficiently raised by the original bill.

A supplemental bill has also been permitted where, after a decree against executors to account, it has been found that, in the lifetime of the testator, an account existed between the testator and one of the executors, in respect of a partnership between them, upon which a balance was claimed to be due from the executor to the estate (e).

To have partnership accounts taken between defendant and his testator.

It may be mentioned here, that, in cases of this description, where the decree had directed the Master to take the accounts in the usual manner, but contained no specific direction to inquire into the fact whether the executor was or was not a partner with the testator, or to take account of any such partnership, Sir John Leach considered the Masters hardly warranted in refusing to take the partnership accounts, the order being to take all accounts; and, upon the petition of the executor, he directed a reference to the Master, to inquire whether the petitioner was a partner with the testator, and, if he should find him to have been a partner, then the Master was to take the accounts of the partnership, the

Whether such accounts may be directed upon petition.

(c) Vide *Barfield v. Kelly*, 4 Russ. 355.

(d) *Jones v. Jones*, 3 Atk. 110.

(e) *Cropper v. Knapman*, 2 Y. & C. 338, Exch. Rep.; and vide *Simmons v. Gutteridge*, 13 Ves. 262.

To supply Defects in original Bill.

Supplemental bill after decree not permitted to introduce a new case, or to add to decree what Court has excluded from it.

petitioner to pay the costs of the petition, and to take the inquiry at his own expense (*f*).

A supplemental bill, after a decree, however, must be strictly in aid of that which the Court has already done (*g*) (1); it must not seek to vary the principle of the decree, but must take the principle of the decree as a basis, and seek merely to supply any omission which there may be in the decree or in the proceedings, so as to enable the Court to give full effect to its decision (*h*). If it does more than this, if it makes a new case, or seeks to add to the decree what the Court has before excluded, then it becomes a supplemental bill in the nature of a bill of review, which cannot be filed without the leave of the Court. Thus, when the decree in the original suit was for an account against trustees in the common form; and the supplemental bill stated that it had been discovered that the trustees had misconducted themselves, and prayed accordingly that they might account for what except for their wilful default might have come to their hands, so that the decree prayed for by the supplemental bill, was essentially different from the original decree. The V. C. of England directed the supplemental bill to be taken off the file, because, being in reality in the nature of a bill of review, it ought not to have been filed without the leave of the Court (*i*). And this decision of his Honor was confirmed by Lord Lyndhurst upon appeal (*k*).

To introduce matters subsequent to original bill.

We have hitherto been chiefly considering supplemental bills as bills applicable to the introduction of facts, that had occurred at the time when the original bill was filed; but the more proper object of such bills is to state facts that have happened since the filing of the original bill, as such matters are not, unless under peculiar circumstances (*l*), the subject of amendment, and must, therefore, be introduced by supplemental bill. It is, however, to be observed, that it is not every relevant event happening posterior to a bill, that renders a supplemental bill admissible (*m*), such events must also be material; and therefore, in a suit for an account, where there is no alteration in the interest of the parties, nor any particular circumstances requiring further discovery, but

(*f*) Woolley v. Gordon, Taml. 11. Bligh, N. S. 474.  
 (*g*) Wilson v. Todd, 1 M. & C. (*k*) 1 Ph. 180.  
 42, 47.  
 (*h*) Hodson v. Ball, 1 Ph. 182. (*l*) As to what subsequent facts may be introduced by amendment of the original bill, see ante, 460.  
 (*i*) Hodson v. Ball, 11 Sim. 456; see also Wilson v. Todd, 1 M. & C. 42, 47; Newdigate v. Newdigate, 8 Ves. 144.  
 (*m*) Milner v. Lord Harewood, 17 Ves. 144.

(1) See ante, 1657, notes.

only a fact has occurred, which may be proved on taking the account prayed by the original bill, and the relief is not varied by the supplemental matter, but the plaintiff might have the relief prayed for by such bill, under the original bill, a supplemental bill is improper, and may be demurred to (n).

To introduce Subsequent Matters.

Subsequent matter must be relevant and material.

Where new parties have become necessary.

If, after a suit has been instituted, any circumstance occurs which, without abating the suit, occasions an alteration in the interest of any of the parties, or renders it necessary that new parties should be brought before the Court, the proper method of doing it is by supplemental bill (o) (1). Thus if, pending a suit affecting an estate which is the subject of an entail, a tenant in tail, whose interests are likely to be affected by it, comes into *esse*, he must be brought before the Court by a supplemental bill (p). So, in a suit relating to the personal property of a married woman, where a decree or order has directed the Master to approve of a settlement on the wife and her children, but before the Master makes his report the wife dies, it has been held, that the children have a right to the benefit of the settlement, and to assert that right by supplemental bill (q).

The reader may also be reminded, in this place, that where a bill has been exhibited against a man and his wife, and the husband dies, pending the suit, and a new interest thereupon arises to the wife, a supplemental bill ought to be filed for the purpose of giving the wife an opportunity of putting in another defence in respect to her newly acquired interest (r).

Where a new interest arises to wife upon death of her husband.

If a plaintiff, suing in his own right, make such an alienation of his property as to render the alienee a necessary party to the suit, but not at the same time to deprive himself of all right in the question, he must bring the alienee before the Court, by supplemental bill, or the alienee may himself file a supplemental bill,

Where sole plaintiff make a partial alienation,

- (n) *Adams v. Dowding*, 2 Mad. 53 ; and see *Acland v. Braddick*, 5 Beav. 486. (q) *Groves v. Clarke*, 1 Keen, 132; *Murray v. Lord Elibank*, 10 Ves. 84; and vide ante, p. 138.  
(o) *Jones v. Jones*, 3 Atk. 217. (r) Vide ante, p. 200-1.  
(p) Lord Red. 63.

(1) See *Thompson v. Hill*, 5 Yerger, 418; *Campbell v. Browne*, 5 Paige, 34; *Carow v. Mowatt*, 1 Edw. 9.

A party, who acquires an entirely new right or interest in the subject matter of the suit, by purchase, pending the litigation, may bring such right or interest before the Court by supplemental bill, or by an original bill in the nature of a supplemental bill. And unless he makes himself a party, by filing a supplemental bill, he will not be allowed to come in and take a part in the proceedings in the cause without the consent of the other parties to the suit. *Wilder v. Keeler*, 3 Paige, 164.

A new defendant cannot be added to a suit on petition. It must be done by a supplemental bill. *Carow v. Mowatt*, 1 Edw. 9.



To introduce  
Subsequent  
Matters.

To pay his  
debts, and sur-  
plus to himself.

against the original plaintiff and the other parties to the suit, to have the benefit of the proceedings. This appears to have been the course pursued in *Binks v. Binks* (s). In that case, a bill was filed by a creditor against Lord Rokeby and the trustees under a deed, executed by him, by which certain property was vested in the trustees to sell, and, out of the proceeds, to pay certain debts due by Lord Rokeby, and the surplus to Lord Rokeby himself: a decree was made, directing an account of the debts and sale of the property, &c., by the Master; but after the Master's report had been made and confirmed, it was discovered that the plaintiff had, previously to the decree, assigned all his interest in the debt of Lord Rokeby to other trustees in trust to recover that debt, and to apply the amount in payment of certain schedule debts of his, the plaintiff's own, and the surplus to the plaintiff. Upon this discovery a supplemental bill was filed by the trustees, under the plaintiff's deed, to have the benefit of the suit instituted by the plaintiff, and, on the hearing of the supplemental suit, it was decreed that the former decree should be carried on and prosecuted between the present parties in the same manner as the same were directed to be carried on by the original parties.

Where one of  
several plain-  
tiffs is entirely  
deprived of  
his right,  
as in the case  
of bankruptcy  
or insolvency,

In like manner if a plaintiff, suing in his own right, is entirely deprived of his interest, but is not the sole plaintiff, the defect, arising from this event, may be supplied by a bill of this kind (t). Therefore if, after the bill filed, one of several plaintiffs totally alienates his right in the subject matter, or becomes bankrupt, so that his interest becomes vested in his assignees, a supplemental bill may be filed by the remaining plaintiffs, either against or in conjunction with the alienee or assignees, to carry on the suit.

— or lunacy.

Upon the same principle it is held that, if a plaintiff becomes a lunatic, a supplemental bill may be filed in the joint names of the lunatic and his committee (u); or if, after the institution of the suit by a lunatic and his committee, the committee dies and a new committee is appointed, the suit may be continued by a supplemental bill on behalf of the lunatic and his new committee.

In what cases  
it is necessary  
to bring an al-  
ienee of the  
plaintiff's in-  
terest before  
the Court by  
supplemental  
bill.

It is to be recollected here, that an assignment or alienation, *pendente lite*, is not permitted to affect the rights of the other parties, unless the alienation disables the party from performing the decree of the Court, as in the case of an assignment by a mortgagee of his interest in the mortgage, pending a suit to redeem, in

(s) 2 Bligh, 593.  
(t) Lord Red. 63.

(u) Ante, p. 108.

which case the assignee must be brought before the Court by a supplemental bill (x). To introduce Subsequent Matters.

Where, however, the assignment *pendente lite* is of an equitable interest, and not, as in the case of bankruptcy by operation of law, there does not seem to be any absolute necessity for the assignee to be brought before the Court, nor does it seem to be material, whether the assignee is a plaintiff or defendant to the bill (y). Where the assignment is *pendente lite* of an equitable interest.

In such a case, however, unless the alienee can be protected by the ordinary course of petitioning for an order that the alienor may not take the fund he is entitled to in the suit out of Court, without notice to him, he, the alienee, may make himself a party to the suit by supplemental bill against the other parties (z). This is generally necessary wherever the alienee wishes to attend the Master under a decree, though it seems that, even in such cases, the Court will upon application give permission to the purchaser, *pendente lite*, of the interest of a party, to attend the Master, without filing a supplemental bill to establish his right, provided the order is qualified so as not to prevent the plaintiff from having any remedies he might be entitled to against the purchaser. The order in such case must be at the expense of the purchaser (a). Where the alienee must make himself party to the suit.

"If the interest of a plaintiff, suing in *autre droit*, entirely determines by death or otherwise, and some other person thereupon becomes entitled to the same property under the same title, as in the case of an executor or administrator upon the determination of an administration *durante minori ætate* (b), or *pendente lite* (c): the suit may, likewise, be added to or continued by supplemental bill" (d) (1). The rule is the same if the committee of a lunatic's or idiot's estate die after the commencement of a suit, and a new committee is appointed in his stead (e). Supplemental bill necessary where interest of plaintiff, suing in *autre droit*, determines.

Formerly the rule was the same in cases of bankruptcy or insolvency; in which case, if a plaintiff an assignee died, or was removed pending a suit, and a new assignee was appointed, a supplemental bill was necessary. Secus, in case of death of assignees of bankrupt or insolvent.

- (x) Lord Red. 74.
- (y) *Eades v. Harris*, 1 Y. & C. 235.
- (z) *Foster v. Deacon*, Mad. & Geld. 59.
- (a) *Toosey v. Burchell*, Jac. 159.
- (b) *Jones v. Basset*, Prec. in Ch. 174; *Stubbs v. Leigh*, 1 Cox, 133.
- (c) Lord Red. 64.
- (d) *Ibid.*; it has been held, that, where a plaintiff sues as personal representative and the representation is determined by death, a subsequent administrator *de bonis non* has been permitted to obtain the benefit of the former proceedings by revivor, and need not file a supplemental bill; Ld. Red. 64, n. (r); *Owen v. Curzon*, 2 Vern. 237; *Huggins v. York Buildings Comp.* 2 Eq. Ca. Ab. 3; vide post, Sect. III.
- (e) Ante, p. 100.

(1) Story Eq. Pl. § 340, and note.

Original Bills in nature of Supplemental Bills. supplemental bill was necessary; but, by recent enactments the necessity for a supplemental bill, in such cases, has been obviated (*f*).

Where interest of sole plaintiff suing in his own right determines, mere supplemental bill not sufficient.

It is to be remarked that, in the cases above put, viz., of those which effect only a partial change in the interest of the plaintiff, or of one of the plaintiffs, the parties to the suit are still, to a certain extent, able to proceed with it, though, from the effect of the change of interest, occasioned by the subsequent event, the proceedings are not sufficient to attain their full object: also, that, in the case of the death of the party suing in *autre droit*, if the suit is continued by the individual succeeding to the character of the deceased plaintiff, there is no change of interest which can affect the parties, but only a change of the person in whose name the suit must be prosecuted (*g*).

Where an original bill in the nature of a supplemental bill necessary.

"If, however, a *sole plaintiff suing in his own right*, is deprived of his whole right in the matters in question by an event subsequent to the institution of the suit, as in the case of a bankrupt or insolvent debtor, whose whole property is transferred to assignees; or, in case such a plaintiff assigns his whole interest to another, the plaintiff, being no longer able to prosecute for want of interest, and his assignees claiming by a title which may be litigated, the benefit of the proceedings cannot be obtained by means of a supplemental bill, but must be sought by *an original bill in the nature of a supplemental bill*" (*h*) (1).

Distinction in effect between supplemental bill in the nature of a supplemental bill (2).

This distinction may, at first sight, appear artificial, but it is attended by a considerable difference in its practical results; for in those cases in which a supplemental bill only is filed, if there has been no decree, the suit may proceed after the supplemental bill has been filed, in the same manner as if the original plaintiff had continued such, except that the defendants must answer the supplemental bill, and either admit or put in issue the title of the new plaintiff (*i*): but, in the case of an original bill, in the nature of a supplemental bill, the whole case is open: "a new defence may be made, the pleadings and depositions cannot be made use of in the same manner as if filed or taken in the same cause, and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the Court to make a similar

(*f*) Vide ante, 81, 230; Solomon

v. Solomon, 13 Sim. 516.

(*g*) Lord Red. 64.

(*h*) Ibid. 65; et vide post, Sect. II.

(*i*) Lord Red. 64.

(1) Story Eq. Pl. § 349; Sedgwick v. Cleaveland, 7 Paige, 287, 290.

(2) Story Eq. Pl. § 345, § 346.

decree" (*k*); whilst in the case of a mere supplemental suit, the benefit of the original decree, if obtained, is expressly given to the new plaintiff by the supplementary decree, and he is declared entitled to stand in the place of the plaintiff in the original bill, and to have the benefit of the proceedings upon it, and to prosecute the decree, and to take the steps necessary to render it effectual (*l*).

Original Bill  
in nature of  
Supplemental  
Bills.

Although there is this material difference in effect between an ordinary supplemental bill, and an original bill in the nature of a bill of supplement, yet there does not seem to be any general rule deducible from the authorities determining the cases in which the transmission of interest of the sole plaintiff renders the one or the other forms of proceeding applicable.

Cases where  
an original bill  
in nature of  
supplemental  
bill necessary.

In the first place, on the authority of Lord Redesdale (*m*), we have seen that upon the bankruptcy of a sole plaintiff, his assignees proceed by original bill in the nature of a supplemental bill.

Bankruptcy of  
sole plaintiff.

In the second place, where a sole plaintiff executes an assignment of his whole interest in the suit, notwithstanding the assignee claims under the former plaintiff, he must, in like manner, proceed by original bill (*n*).

When plaintiff  
assigns his  
whole interest.

We shall hereafter find that in general, where the interest of a plaintiff is transmitted to another person coming in under the same title, the suit may be proceeded with by a common supplemental bill in continuation of the original suit.

The reason why an assignee of the plaintiff must file an original bill is stated to arise from the doctrine of maintenance, in consequence of which "It is not enough for the new plaintiff to state that his assignor instituted a suit and assigned to him the benefit of it; he must show that his assignor had the property in respect of which the suit was instituted, and that that property has been assigned and carries with it the right to sue" (*o*).

Reason why  
assignee of  
plaintiff cannot  
file simple  
bill of supplement.

Thirdly, we have seen that when the plaintiff sues in *autre droit* and his interest determines, his successor representing the same interest may proceed by a simple bill of supplement, and this rule applies although he does not claim under the former plaintiff (*p*).

Where a simple  
bill of supplement  
sufficient.

We have now to consider the case where a new party comes in by the same title as the original plaintiff, but does not claim directly by assignment from him; thus, where a tenant in tail succeeds

Where tenant  
in tail succeeds  
former tenant  
in tail.

(*k*) Ibid.; Atty.-Gen. v. Foster, 2 Hare, 81; 13 Sim. 282, S. C.

(*l*) Ibid. 65.

(*m*) Ld. Red. 65.

(*n*) Ld. Red. 65.

(*o*) White on Supplement and Revivor, 174, 126.

(*p*) Ante, p. 1665, n. (*d*).

When mere  
Supplemental  
Bill sufficient.

although he  
comes in by  
virtue of a  
new limitation.

Rule laid  
down by Lord  
Eldon.

Tenant in tail  
in remainder  
entitled to the  
benefit of pro-  
ceedings by a  
former tenant  
in tail,

and of evi-  
dence in the  
former suit.

ceeds to a title to sue in equity, upon the death of a preceding tenant in tail. In this case he may proceed by supplemental bill, by way of continuation of the original suit (*q*): nor does it appear to make any difference, provided he comes in under the same title, that he comes in by force of a new limitation in remainder, upon the determination of a preceding estate tail; he will, in such case, be entitled to continue the suit in the same manner as a tenant in tail coming in by succession as issue in tail (*r*).

The point was much discussed by Lord Eldon, in his judgment in the case referred to, of *Lloyd v. Johnes* (*s*); in that case, the original bill had been filed by a tenant in tail, who died after the cause was at issue, but before any witnesses were examined; whereupon the present plaintiff, who claimed the estate in question under the same settlement, (as the issue of a tenant in tail in remainder expectant upon the decease of the former tenant in tail without issue,) filed a supplemental bill to have the benefit of the former

suit and proceedings, &c. The defendants answered the supplemental bill, referring to their answer to the original bill; but upon the hearing of the cause, an objection was made to reading the evidence taken on the part of the plaintiff in the supplemental suit, on the ground that the facts in issue by the original bill, were not put in issue by the supplemental bill, and that the plaintiff's course of proceeding ought, therefore, to have been by original bill in the nature of a supplemental bill, by which all the facts stated in the original bill would have been put in issue, whereas the only fact put in issue, by the supplemental bill, was whether the original bill was filed by the former plaintiff.

Lord Eldon pronounced a very elaborate judgment upon the case, the result of which was, that the supplemental bill, as filed, might be maintained, and that the facts in the original bill were sufficiently in issue to warrant the reading of the evidence taken in the supplemental suit; his Lordship's opinion being, that, inasmuch as upon a bill claiming a charge upon the whole inheritance, in strict settlement, against the first tenant in tail in being, it is the practice, if he dies without issue, to give the plaintiff all the benefit of the proceedings against the next tenant in tail in remainder by supplemental bill, the same principle which is applied against the second tenant in tail must be applied in his favor (*t*).

His Lordship appears also to have held, upon the same occasion, that if, in the original suit, witnesses had been examined before the

(*q*) *Lloyd v. Johnes*, 9 Ves. 37.

(*r*) *Ibid.*

(*s*) *Ubi supra.*

(*t*) 9 Ves. 60.

death of the first tenant in tail, whether *de bene esse* or *in chief*, the benefit of their testimony might be had in the supplemental suit (u). Original Bill in nature of Supplemental Bills.

So also, in the case of an answer, his Lordship appeared to think, that the plaintiff in the supplemental suit might read the answer of the defendant to the original bill, "subject always to this, that when the tenant in tail takes a different interest, or rather a similar interest, not affected by the same circumstances, it is competent, both for and against him, to bring forward the equities belonging to those different circumstances as contradistinguishing his case."

The reason assigned by Lord Eldon, in the above cause, for allowing the remainder-man in tail to continue a suit commenced by a former tenant in tail, is, the great hardship which must result to a person so situated, if he be not permitted to take that course; for as a Court of Equity, for the convenience of justice, in many cases, considers a tenant in tail as having the whole estate vested in him, at least for the purposes of the suit, and does not look beyond the estate tail in a suit aiming by the decree to bind the right to the land, the subsequent remainder-man has a clear interest in the event of a suit of the prior tenant in tail, and it would be a great injustice to deprive him of any benefit which might result from a suit, by which, if unfavorable, his interests would be bound. Reason of the rule.

From the observations in that case it is to be collected, that it is only on the ground that a tenant in tail is supposed to represent the inheritance and the interests of all those claiming in remainder after him, that a remainder-man coming in after the determination of the estate tail of the first plaintiff, is permitted to carry on the same suit by supplemental bill, instead of being driven to his original bill; when, therefore, this ground fails, and the estate of the original plaintiff was less than an estate tail, *e. g.*, an estate for life, a person coming in upon a remainder, on the determination of such prior estate, cannot continue the suit, but must commence *de novo*, by original bill, in the nature of a supplemental bill; and the reason of this is obvious, when it is considered, that depositions taken in a cause against the original plaintiff having a less interest than an estate tail, cannot be read against a remainder-man (x), and it is therefore necessary, in order to give the defendants an opportunity of bringing forward evidence against the new plaintiff, that they should have an opportunity of examining their witnesses *de novo*. Rule does not apply where interest of original plaintiff was less than an estate tail.

(u) Ibid. 59.

(x) Ante, p. 1012.

Original Bills  
in nature of  
Supplemental  
Bills.

As in the in-  
stance of a bill  
by a tenant for  
life only.

Where bill by  
tenant for life,  
remainder-  
man in tail  
must file orig-  
inal bill in the  
nature of sup-  
plemental bill ;

It is somewhat singular, that Lord Redesdale does not advert to the distinction, in this respect, between suits originally commenced by a tenant in tail, and suits commenced by a tenant for life. In pointing out the cases in which an original bill in the nature of a supplemental bill will be proper, his Lordship says, that, in the case of a remainder-man in a settlement becoming entitled, upon the death of a prior tenant under the same settlement, the suit cannot be maintained by bill of revivor, nor can its defects be supplied by supplemental bill (y). His Lordship, although "provoked to accuracy upon this subject" (z), is evidently, in the passage, at present under consideration, directing his attention more to the distinction between original bills, in the nature of bills of revivor, and original bills in the nature of supplemental bills, than to the difference between the latter and mere supplemental bills. However, there can be no doubt that, as applied to suits by tenants for life, a mere supplemental bill by a remainder-man, will not be sufficient to give such remainder-man the benefit of the former proceedings, but that his course must be to file an original bill in the nature of a supplemental bill. So also must an ecclesiastical person succeeding to a benefice, if he wishes to obtain the benefit of proceedings instituted by his predecessor (a).

(y) Lord Red. 72 ; it is remarkable that the case referred to, by his Lordship, in support of his proposition, is one which, if it bears at all upon the point, is, as far as it affects the question in discussion, of a contrary tendency. The case is *Osborne v. Usher*, which occurs in the original edition of Mr. Brown's Parliamentary Cases, at vol. 2, p. 314, but will be found in Mr. Tomlin's edition, at vol. 6, p. 20. The short abstract, at the head of the case, is—"Where a suit abates by the death of the plaintiff, a person claiming by provision, or per formam doni, and not as heir or representative of the deceased plaintiff, cannot revive, but must bring his original bill, or commence an action at Law." The same construction is put upon the case in 2 Eq. Ca. Ab. 3, margin, and in 4 Viner's Ab. p. 432, Ca. 17 ; but upon referring to the report of the case itself, it will be found that the question, whether a person claiming in remainder might revive the suit, did not arise, but that the question

was, whether such a person could appeal from a decision made against a former tenant in tail claiming under the same ancestor, and that the House determined in favor of his right to appeal, although it afterwards dismissed the appeal, upon the merits, with costs. This mistake has probably arisen from the person who made the statement, at the head of the case, having adverted to the order affirming the appeal, without noticing that there had been a prior determination of the House upon the right to appeal. *Wingfield v. Whaley*, 2 Bro. P. C. 447 ; *ibid.* Toml. ed. vol. 1, p. 200. The other case, referred to by Lord Redesdale, certainly establishes the proposition that, in the case put, a bill of revivor will not lie, but it goes a great way in establishing the proposition, that a remainder-man may have the benefit of proceedings against a tenant in tail. 9 Ves. 57.

(z) Vide 9 Ves. 58.

(a) Lord Red. 72.

respect of charges created by the author of the gift;" and, in *Atkin v. Lethbridge* (c), his Lordship has determined, that the title accruing since the filing of the original bill, will not even the same person to carry on a suit by supplemental bill in a case where the title upon which he originally proceeded was filed.

The same principle which applies to suits by a tenant in tail, where the suit is against him; and, therefore, if a bill is filed against a charge upon the whole inheritance in strict settlement, the first tenant in tail in being is made a party defendant, and without issue, — according to the constant practice, all the things may be had against the second tenant in tail, as if he were originally a party, by means of a supplemental bill (d). So, where a bill is filed for the purpose of raising a charge on the inheritance, divided into estates tail against a remainder-man, those intermediate not being yet *in esse*; if, after the first tenant in tail has proceeded to a certain length, an intermediate remainder-man comes *into esse*, the course is to file a supplemental bill against him, stating the former proceedings, and such statement is held sufficient to put the facts originally in issue, — in which regard to such defendant; and he may even have the benefit of the depositions of any witnesses that may have been examined, if the witnesses should die (e). The rule in this case, as applied to a defendant, is subjected to the same qualification that it is subject to where the tenant in tail is plaintiff, that where a tenant in tail takes a different interest, or rather a different interest not affected by the same circumstances, it is not the same, both for, and against him, to bring forward the equities applicable to those different circumstances, as contradistinguishing between the two cases (f).

tract (1).

Rule applies to suit *against* as well as to suits *by* tenants in tail.

Where second remainder-man in tail becomes entitled.

Where an intermediate tenant in tail comes into *esse*.

On a bill by or against a tenant in tail, new equities may be brought forward applicable to his title.



When mere Supplemental Bill sufficient.

Remainder-man may appeal.

When, as against a new defendant, bill must be original, in the nature of a supplemental bill.

Not in the case of bankruptcy, &c.

Supplemental bill sufficient where interest of a person defending in *autre droit* is determined.

The reader is to be reminded, in this place, that when there is a decree against a tenant in tail, and he dies without issue, a subsequent remainder-man may appeal from the decree; for which purpose, however, he must make himself a party to the original suit by supplemental bill, praying to have the benefit of the proceedings, for the purpose of appealing from the decree (*g*).

"If by any event, the whole interest of a defendant is entirely determined, and the property is become vested in another, by a title not derived from the former party, as in the case of succession to a bishopric or benefice, or of the determination of an estate tail, and the vesting of a subsequent remainder in possession (*h*), the benefit of the suit against the person becoming entitled by the event described, must be obtained by original bill, in the nature of a supplemental bill" (*i*) (1).

This rule, however, is only applicable when the estate or interest of the defendant is actually determined and a new estate or interest accrues to another party. Where the estate or interest of the defendant is not determined, but only becomes vested in another, by an event subsequent to the institution of the suit; as in the case of bankruptcy or insolvency (*k*), or of alienation by deed (*l*), the defect in the suit may be supplied by supplemental bill, whether the suit is become defective merely, or abated as well as defective (2).

The same rule also applies to cases where the interest of a person sued in *autre droit*, is determined pending the suit, as in the case of an administration *durante minori ætate* or *ad litem*, or of

(*g*) Giffard v. Hort, 1 Sch. & Lef. 386, 410.

(*h*) This must be understood upon the principles laid down in Lloyd v. Johns, ubi supra, to apply to those cases only, in which the inheritance has not already been represented, vide ante, p. 1670.

(*i*) Lord Red. 67.

(*k*) Ante, p. 229-30.

(*l*) It is to be recollected, that with

respect to purchasers or incumbrancers becoming such after the bill filed, they will be bound by the decree, whether the plaintiff have notice of them or not; and, therefore, they need not be brought before the Court by supplemental bill, unless the legal estate has become vested in them, of which it is necessary to procure a conveyance. Ante, 327.

(1) Story Eq. Pl. § 350, and note.

(2) See Story Eq. Pl. § 342; Sedgwick v. Cleaveland, 7 Paige, 290.

For in these cases, the new party comes before the Court exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit. But the distinction is constantly to be borne in mind between cases of voluntary alienation and cases of involuntary alienation, as by the insolvency or bankruptcy of the defendant. In the latter cases, the assignee must be made a party; in the former, he may or may not, at the election of the plaintiff. Sedgwick v. Cleaveland, 7 Paige, 290, 291; Story Eq. Pl. § 342.

an executor *pendente lite*. It will also, as it seems, notwithstanding the Stat. 6 Geo. IV. c. 16, s. 7, and 7 Geo. IV. c. 57, apply to the case of assignees of bankrupts or insolvent debtors dying or removed, after the suit commenced (*m*). When mere Supplemental Bill sufficient

It is to be observed that, till the appearance of a defendant to the bill, there is, strictly speaking, no cause in Court as against that defendant; therefore, if the interest of a defendant, named as a party to the original bill, should determine before such defendant should have appeared, the suit cannot be continued, against the person in whom his interest has become vested, by a mere supplemental bill; but an original bill in the nature of a supplemental bill must be filed, which, although merely supplemental against the other defendants, must pray that the new party may answer the original bill as well as the supplemental matter, and pray distinct relief, to which the plaintiff may consider himself entitled against the new defendants (*n*). Till defendant appears, no cause in Court against him. If he dies before appearance, suit can only be continued by original bill.

It may also be observed, that where, after a decree, a defendant becomes bankrupt, his assignees cannot, by petition, obtain leave to go before the Master, upon taking the account under the decree; they must either wait till the plaintiff brings them before the Court by supplemental bill, or file a supplemental bill themselves; but it may be mentioned, that in *Philipps v. Clark* (*o*), the V. C. of England has determined that, after a decree, the assignee of a defendant, although he may, in case of the plaintiff's omission, bring himself before the Court by supplemental bill, yet, as the plaintiff is entitled to the conduct of his own case, he cannot do so, without previously applying to the plaintiff to file a supplemental bill. In that case, the assignee of an insolvent defendant, without any previous application, filed a supplemental bill, and afterwards the plaintiff filed one, and moved that the assignee's bill might be taken off the file for irregularity, which was ordered: the Vice-Chancellor distinguishing a supplemental bill, in such a case, from a bill of revivor after a decree, which may be filed by a defendant without notice to the plaintiff; as the effect of such a bill, is not to take the conduct of the suit out of the hands of the plaintiff, but merely to place the proceedings in the same state that they were in at the time of the abatement (*p*). Assignees of bankrupt defendant cannot go before Master under decree without supplemental bill. But assignee cannot file supplemental bill himself, without previous notice to the plaintiff.

This brings us to the consideration of another case, in which a supplemental bill is frequently resorted to, viz., where in a suit of plaintiff in

(*m*) Vide ante, p. 351. Nicholls, 1 Taml. 307.  
 (*n*) *Asbee v. Shipley*, Mad. & (o) 7 Sim. 231.  
*Geld* 296; vide etiam, *Crowfoot v. Mander*, 9 Sim. 396; *Stewart v.* (*p*) *Livesey v. Livesey*, 1 R. & M. 10; and vide post, sect. 3.

When mere  
Supplemental  
Bill sufficient.

creditor's suit,  
another credi-  
tor may file  
supplemental  
bill,

— but must  
give notice to  
representative  
of former cred-  
itor.

Whether no-  
tice of mo-  
tion must  
be served upon  
defendant, as  
well as upon  
representative  
of former cred-  
itor.

instituted by a creditor, on behalf of himself and other creditors, of a person deceased, the creditor who files the bill dies, and his representative omits to continue the suit after decree; in such case it is almost a matter of course, to permit another creditor, who has come in under the decree and established his claim as creditor before the Master, to take up the proceedings by supplemental bill (*q*).

It is to be observed, however, that as the representative of the deceased creditor has an interest in the prosecution of the suit, in respect of the costs already incurred in it, no other creditor is at liberty to file a supplemental bill, without notice to such representative; and that the proper course is, for the creditor desiring to prosecute the suit, to move that he may be at liberty to file a supplemental bill, if the representative of the deceased plaintiff do not revive within a limited time, and to serve such order upon the representative (*r*).

It seems, from the statement of the facts in *Houlditch v. The Marquis of Donnegall* (*s*), that the motion for leave to file the supplemental bill was made upon notice, served both upon the representatives of the former plaintiffs, and upon the defendant; and that it was held, that if the defendant had any objection to urge to the supplemental bill being filed, he should have taken that opportunity of stating it to the Court, and should not have waited to do so till he put in his answer to the supplemental bill.

In that case, the objections taken by the defendant's answer, were founded on the delay which had taken place, and the fact that the validity of the debentures, under which the plaintiffs claimed, were in issue in another suit instituted in Ireland by the plaintiffs themselves, and these objections were urged at the hearing of the supplemental suit; but Sir J. Leach, V. C., held, that although, upon the second ground, he should have hesitated very much before he made the order giving the plaintiffs liberty to file a supplemental bill, yet, as the order had been made, and the bill filed, the plaintiffs were entitled to have the same benefit of the proceedings in the original suit, as the representatives of the

(*q*) *Houlditch v. Marquis Donnegall*, 1 S. & S. 491; *Dixon v. Wyatt*, 4 Mad. 392. Some doubt appears to be thrown upon this, by a passage in Lord Redesdale's treatise, p. 79, in which he says, in case of a bill by creditors, on behalf of themselves and other creditors, any creditor is entitled to revive, from which it may be inferred, that a bill of revivor and

not a supplemental bill, is the proper form of proceeding to be adopted; the practice, however, seems to be in favor of a supplemental bill; *Dixon v. Wyatt*; *Houlditch v. Marquis Donnegall*, ubi supra; sed vide, *Pitt v. The Creditors of the Duke of Richmond*, 1 Eq. Ca. Ab. 3, pl. 7.

(*r*) *Dixon v. Wyatt*, 4 Mad. 392.

(*s*) Ubi supra.

original plaintiff would have had, if they had proceeded by bill of revivor (t).

To introduce Subsequent Matters.

With respect to the form of a supplemental bill, the 49th Order of August, 1841 (1), directs, "That it shall not be necessary, in any bill of revivor or supplemental bill to set forth any statements in the pleadings in the original suit, unless the special circumstances of the case may require it" (2).

Form of a supplemental bill

This order, it will be observed, does not extend in terms to original bills in the nature of bills of supplement: whether such bills are included under the general term supplemental bills is perhaps not very material, as in either view of the case, the extent in which it will be necessary in bills of this description to restate the pleadings in the original suit, will have to be determined by the special circumstances of the case. With respect to a simple bill of supplement filed against the parties to the original suit, for the purpose of putting in issue new matter, it does not seem that ever was the practice to introduce statements from the pleadings in the original suit. Moreover, where the original bill has been properly filed against all necessary parties, but in consequence of the transmission of the interest of one of those parties to another, as by alienation or bankruptcy, *pendente lite*, it becomes necessary to file a supplemental bill against the alienee or assignee, for the purpose of bringing him before the Court; it has been generally considered unnecessary to restate the original bill in the supplemental bill, because as the new party comes in upon the same title as the original party, all that seems necessary to be put in issue against such new party, is the fact of the transmission of interest having taken place; and therefore, it may be sufficient to state merely the prayer of the original bill (u).

Whether order extends to original bill in nature of supplemental Bill

The course, however, must be different in cases in which the object of the supplemental bill is not to continue the suit against the person in whom the interest of a party, originally before the Court, has become vested, but to bring before the Court an entirely new party, who either was interested at the time the original

Where object is to bring before the Court an entirely new party, plaintiff's title must be stated.

(t) *Dixon v. Wyatt*, 4 Mad. 495.

(u) See, however, p. 1667.

(1) The Supreme Court of the United States have adopted the same rule. See *Equity Rules* of January Term, 1842, Rule 47.

(2) In *Story Eq. Pl.* § 343, it is said that "A supplemental bill must state the original bill and the proceedings thereon; and if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event and the consequent alteration with respect to the parties; and in general, the supplemental bill must pray, that all the defendants may appear and answer to the charges it contains." *Mitford Eq. Pl.* by Jeremy, 76. See next note above.

Form of Supplemental Bill.

What statement sufficient to put the whole case in issue against a new defendant.

Recital of former bill against a new defendant.

bill was filed, or has become so under a new title but derived from a former party, as in the case of a necessary party omitted, and subsequently brought before the Court by supplemental bill, or of a new party coming into *esse* after the original bill is filed : there the supplemental bill is, in fact, an original bill as against the new defendant, and must state enough of the case to put the title of the plaintiff, to relief against such new defendant in issue ; for as a defendant, who was not a party to the original bill, coming in upon a new title, cannot be called upon to answer the original bill (x), there is no other method by which the plaintiff's title to maintain the suit, as against him, can be put in issue, than by a statement of it in the supplemental bill. It is, however, to be observed, that, for this purpose, the mere statement of the former proceedings has been held sufficient to put the facts of the case in issue with regard to this sort of defendant (y), i. e., "you may, in the supplemental bill, state that you have made such a representation in the former bill, instead of representing the facts in the second bill" (z). In the case of the Attorney-general v. Foster (a), the supplemental information was against new defendants, and under such circumstances, that Sir J. Wigram, V. C., did not consider they were bound by the former proceedings in the cause. The supplemental information did not state the facts in the original information ; whereupon it was contended that, as it tendered no other issue than whether the defendants were bound by the proceedings in the original bill, if the defendants were not bound by such proceedings, the Court must dismiss the supplemental information, but could make no decree upon the merits of the original information. Sir J. Wigram, apparently with some difficulty, overruled the objection, holding that this brief statement sufficiently put the whole case in issue against the new defendants. Moreover, in *Vigers v. Lord Audley* (b) the V. C. of England held, before the 49th Order, that even where a supplemental bill is filed against a new defendant, it is not necessary to state in it all the circumstances of the case at length ; all that is requisite is, that the plaintiff should state so much of the case as shows that he has an equity against such defendant. In that case, the plaintiffs, who were members of a joint-stock company, had filed a bill against the directors, and obtained an injunction against them.

(x) *Baldwin v. Mackown*, 3 Atk. 817. It is, however, usual to call upon a new party who ought to have been a party to the original bill to answer that original bill. It does not, however, seem clear, that he is either bound or entitled to take an office

copy of it, see post, 1679-80.

(y) *Lloyd v. Johnes*, 9 Ves. 37.

(z) *Ibid.*

(a) 2 Hare, 81, and see post.

(b) 9 Sim. 72.

Form of.

A new director was afterwards elected, and on his doing an act, in conjunction with one of the original directors, which was prohibited by the injunction, the plaintiffs filed a supplemental bill, on behalf of themselves and the other shareholders, stating merely that they had filed an original bill, which stated, amongst other things, the formation of a company, an act of Parliament enabling any director to sue or be sued on behalf of the company; and a contract, alleged to have been entered into by one of the directors with Lord Audley, and that the shareholders of the company were very numerous, and, therefore, could not be made parties to the suit, so as to enable the plaintiffs to prosecute it with effect. The supplemental bill then set out the prayer of the original bill, that an injunction had been granted by the Lord Chancellor, restraining the directors from signing or issuing bills of exchange or other securities, and various other proceedings in the cause. It then stated the appointment of the new trustee, and the facts complained of as against him and the other directors, and concluded with the usual supplemental prayer praying the same relief against the new defendant as was prayed by the original bill against the original defendant. To this bill, the new defendant put in a general demurrer, which was attempted, on the argument, to be supported principally on the ground that, as the same relief was prayed against the new defendant as the plaintiffs were entitled to against the other defendant, it was not sufficient to refer to the original bill as being on the files of the Court, but the case made by the bill ought to have been stated over again, otherwise it did not show that the plaintiff had any equity to the relief prayed; but the Vice-Chancellor overruled the demurrer, as the plaintiffs, having stated that the Judge of the Court had granted an injunction in the prior stages of the cause, had therefore stated sufficient to show that there was an equity.

If the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration of parties thereon (b); and it must pray, that the defendants may appear and answer to the charges it contains; for, if the supplemental bill is not for a discovery merely, the cause must be heard, upon the supplemental bill, at the same time that it is heard upon the original bill, if it has not been before heard; and if the cause has been before heard, it must be further heard upon the supplemental matter (c) (1).

Statement of supplemental matter.

(b) Lord. Red. 75.

(c) Ibid.

(1) Story Eq. Pl. § 343.

The supplemental matter must be verified by affidavit or other satisfactory proof. Fedrick v. White, 1 Metcalf, 76.



of bringing formal parties before the Court as defendants, the parties defendants to the original bill need not, in general, be made parties to the supplemental (*k*). Parties to.

It may be mentioned here, that a new party, representing the interest of a former party, who comes before the Court by a supplemental bill, whether filed by himself or by the plaintiff, stands exactly in the same plight and condition as the former party, is bound by his acts, and may be subject to all the costs of the proceedings from the beginning of the suit (*l*) (*1*); therefore it has been held that a purchaser of the interest of a party, *pendente lite*, on filing his supplemental bill, comes into Court *pro bono et malo*, and is liable to the costs of the proceedings from the beginning to the end of the suit (*m*). So also, the assignees of a bankrupt who are brought before the Court by supplemental bill, may be liable to the costs of the whole suit, if they improperly resist the plaintiff's demand (*n*); where, however, it appeared that the plaintiff had made no application to the assignees, on the subject of the suit, previously to filing the supplemental bill, Sir John Leach, V. C., refused to give costs against them (*o*). New party brought before Court by supplemental bill subject to costs from commencement of suit.  
Costs where new parties resist the plaintiff's demand.

A supplementary bill generally calls upon the defendant to answer the supplemental matter only; if, however, it is occasioned by the transmission of the interest of a defendant who has not answered the original bill, and it is necessary to have a discovery, from the new defendants, of the matters in the original bill, it may pray that the defendant may answer the original bill (*p*). And, in such case, the defendant will be bound to answer the original as well as the supplemental bill. The rule upon this subject is clearly laid down by the Vice-Chancellor, in *Vigers v. Lord Audley* (*q*), viz., "When a bill of revivor and supplement is filed against a person who represents a defendant to the original bill, and the bill of revivor and supplement prays that the representative of the deceased defendant may answer both bills, he is bound to do so, although the *subpœna* taken out is a *subpœna* that requires him to answer the bill of revivor and supplement only; and the answer, in such a case, is headed as the answer of that defendant to the bill of revivor and supplement, and also to Prayer that defendant may answer original bill.  
When defendant to supplemental bill must answer original bill.

(*k*) Lord Red. 75; *Greenwood v. Atkinson*, 5 Sim. 419.

(*l*) Lord Red. 68.

(*m*) Anon. 1 Atk. 89.

(*n*) *Whitcombe v. Minchin*, 5 Mad.

(*o*) Ibid.

(*p*) Vide *Vigers v. Lord Audley*, 9 Sim. 409.

(*q*) Ubi supra.

(1) Story Eq. Pl. § 342; *Sedgwick v. Cleveland*, 7 Paige, 290, 291; ante, 1672, and note.



|                                                                                      |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
|--------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Parties to.                                                                          | the original bill." His Honor also added, that if the case is that of a mere bill of revivor, that is, one which does not require any answer to itself, but asks that the defendant may answer the original bill; an attachment will issue against the defendant if he do not answer the original bill.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                   |
| In the case of supplemental bills caused by transmission of interest of a defendant. | It is to be observed, that, although the rules above stated were laid down in a case in which the bill was a bill of revivor as well as of supplement, they will apply equally to supplemental bills occasioned by the death of a defendant, whose interest has become vested in another by a title which will not admit of a bill of revivor merely; or where a defendant becomes bankrupt or insolvent after appearance but before answer, and a supplemental bill is required to bring his assignees before the Court. So also, where a defendant dies before service of the <i>subpœna</i> or appearance, so that there is no original suit in Court, as against him, in consequence of which it is necessary to file a bill, which, as against the person who represents the interest of the plaintiff dying, is an original bill in the nature of a supplemental bill, the new bill may pray that the defendant may answer the original bill at the same time that he answers the supplemental matter ( <i>s</i> ). |
| Prayer for process.                                                                  | In other respects the prayer of a supplemental bill must be adapted to the object for which it is exhibited; but it always concludes with praying the process of the Court in the usual form.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |
| How filed.                                                                           | A supplemental bill must be signed by counsel, and is filed in the same manner as the original bill.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| <i>Subpœna</i> to appear and answer. Form of.                                        | A <i>subpœna</i> to appear and answer a supplemental bill is in the same form as a <i>subpœna</i> to answer an original bill, except that it specifies the nature of the bill which has been filed (1). The form of the <i>subpœna</i> is set out in the appendix to the Orders of May, 1845, and obedience to the writ may be enforced in the same manner and by the same process as a <i>subpœna</i> to answer an original bill ( <i>t</i> ).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Process in case of a Peer.                                                           | It is to be observed, that where a supplemental bill or a bill of revivor, is filed against a peer, and he is required to answer the original bill as well as the supplemental bill, or bill of revivor, he must be served with an office copy of the original bill at the same time that he is served with the letter missive to answer the origi-                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |

(*s*) *Asbee v. Shipley*, Mad. & Geld. 296.      (*t*) *Vide ante*, p. 496.

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(1) If a party to the original bill does not voluntarily appear to the supplemental bill, the plaintiff must proceed by *subpœna* to compel an appearance to the same. *North American Coal Co. v. Dyett*, 2 Edw. 115.

nal bill, and that process issued for default of appearance, without serving him with such a copy, will be irregular (*u*).

Prayer that Defendant may answer original Bill.

Many of the causes of demurrer which apply to an original bill, will apply to a supplemental bill (*x*), but there are some grounds of demurrer which are applicable solely to supplemental bills. Thus if a supplemental bill is brought upon matter arising before the filing of the original bill, where the suit is in that stage of proceeding that the bill may be amended, the defendant may demur (*y*) (1), even though the bill contains an allegation that the facts were not known to the plaintiff till the original cause was at issue (*z*).

Demurrers to supplemental bills.

A defendant to a supplemental bill, may also demur if the same plaintiff files a supplemental bill claiming the same matter as in his original bill, but upon a title totally distinct, as in the case of *Tonkin v. Lethbridge* (*a*), where a plaintiff filed a bill to redeem a mortgage as heir at law, and, upon an issue directed, was found not heir, and afterwards bought in the claim of a third person to the heirship, and filed a supplemental bill claiming under that purchase, the demurrer was allowed (*b*).

If a bill is brought as a supplemental bill upon matter arising subsequent to the time of filing the original bill, against a person who claims no interest out of the matters in litigation by the former bill, the defendant to the bill thus brought as a supplemental bill may demur, especially if the bill prays that he may answer the matters charged in the former bill (*c*) (2).

It may be observed here, that a defendant cannot demur to a supplemental bill upon the ground that, by the present practice of the Court, the plaintiff may obtain that relief by petition for which a supplemental bill was formerly necessary; as where, after a decree in a creditor's suit, upon the plaintiff being guilty of *laches*, another creditor was desirous of getting the conduct of the cause, and filed a supplemental bill for that purpose, it was held that a demurrer would not lie, because he had taken that course instead of applying to the Court by petition as he might, according to the practice, have done (*d*).

(*u*) *Vigers v. Lord Audley*, 9 Sim. & C. 1—9; et ante, p. 1595-6. 409, ante, p. 503.

(*x*) *Lord Red.* 201.

(*y*) *Ibid.* 202.

(*z*) *Colclough v. Evans*, 4 Sim. 76; *and vide Crompton v. Wombwell*, *ib.* 626; and the *Attorney-general v. The Fishmonger's Company*, 4 M. & C. 1—9; et ante, p. 1595-6.

(*a*) *Cooper*, 43.

(*b*) *Vide ante*, p. 1670—1; et *vide Pilkington v. Wignall*, 2 Mad. 240.

(*c*) *Lord Red.* 202; and *vide Baldwin v. Mackown*, 3 Atk. 817.

(*d*) *Davies v. Williams*, 1 Sim 5; *vide ante*, p. 1348-9.

(1) *Stafford v. Howlett*, 1 Paige, 200; *Story Eq. Pl.* § 614.

(2) *Story Eq. Pl.* § 614.

- Defence to.** With reference to this part of the subject, it may be mentioned that a motion will not lie to take a supplemental bill off the file for irregularity on the ground that it does not state supplemental matter. The proper course, in such case, is to demur (*e*) (1).
- Pleas to.** Besides those grounds of plea, which are common to supplemental and original bills, if a supplemental bill is brought on matter which arose before the original bill was filed and might have been introduced into the original bill, and this fact does not appear upon the supplemental bill, it may be pleaded (2).
- Practice with regard to pleas and demurrers.** Pleas and demurrers to supplemental bills are subject to the same rules both with respect to their form and substance, and to the practice arising upon them, as pleas and demurrers to original bills.
- Answers to.** If a defendant to a supplemental bill neither demurs nor pleads to it, he must put in his answer as in the case of an original bill. The reader is reminded in this place, that, according to the doctrine of Lord Eldon, in *Lloyd v. Johnes* (*f*), where after an original bill, filed either by or against a tenant in tail who dies, a supplemental bill is filed either by or against a remainder-man in tail, although the plaintiff in the one case, or the defendant in the other, is generally bound by the statement or defence in the original cause; neither plaintiff nor defendant is shut out from stating particular circumstances attaching upon his case, and these circumstances may be brought before the Court either by the bill or by the answer or by a fresh examination of witnesses (*h*). This rule, however, will not apply to issue in tail, heir, or devisee, but is applicable only to a remainder-man claiming by force a new limitation (*i*).
- Form of.** The form of an answer to a supplemental bill, and the manner of putting it in, filing it, &c., are the same as in the case of an answer to an original bill, and are subject to the same contingencies (*k*).

(*e*) *Bowyer v. Bright*, 13 Pri. 316. Bro. P. C. 200

(*f*) 9 Ves. 45.

(*i*) *Lloyd v. Johnes*, ubi supra.

(*h*) Vide *Wingfield v. Whaley*, 1

(*k*) Vide ante, p. 813.

(1) See Story Eq. Pl. § 616.

Whether in case of a supplemental bill filed without leave of the Court, the objection should be taken advantage of by demurrer or motion to dismiss, was started, but not decided, in *Pedrick v. White*, 1 Metcalf, 76, 79.

If a supplemental bill is filed without any sufficient grounds, the defendant may demur. *Lawrence v. Bolton*, 3 Paige, 294.

(2) *Stafford v. Howlett*, 1 Paige, 200.

So, if a supplemental bill is filed without any sufficient grounds, the defendant may make the objection by plea. *Lawrence v. Bolton*, 3 Paige, 294.

Where a defendant to a supplemental bill is called upon to answer the original bill at the same time that he answers the supplemental matter, the usual course is to include the answer to the original bill and supplemental bill in the same answer (l); it appears, however, that it is not absolutely irregular to separate them; and, in *Sale v. Graham* (m), where female plaintiffs had amended their original bill after answer, and married before the amendments were answered; whereupon a bill of revivor and supplement was filed by them and their husbands praying that the defendants might answer the amended bill, and the defendants, before they answered the amendments, put in an answer to the bill of revivor and supplement only, the Vice-Chancellor refused an application to take the answer off the file for irregularity, on the ground that it was still competent to the defendants to answer the amended bill.

Answer of.  
Where defendant is required to answer original bill also.

A replication may be filed by the plaintiff to a supplemental bill, as in the case of an original bill (n); it is to be observed, however, that a separate replication in a supplemental suit, is only necessary where there has been already a replication in the original suit. Where there has been no replication in the original suit, a general replication will apply to the whole record, and not merely to the original bill (o).

Replication.

If the new matter in the supplemental bill is not admitted by the defendant's answer, it must be proved, otherwise the supplemental bill will be dismissed with costs (p) (1). For this purpose, witnesses may be examined as to the new matter contained in the supplemental suit, and it is said that if interrogatories have been already exhibited in the original cause, the Court will, upon motion, give leave to add to the interrogatories in the original cause, so as the new interrogatories contain nothing but what relates to the supplement (q).

In what cases new witnesses may be examined.

This restriction, however, can only apply to cases in which interrogatories have already been exhibited, or the witnesses have only been partly examined in the original cause: where no witnesses have been examined, or no interrogatories have been exhibited in the original cause, interrogatories may, (provided publication has not passed,) be exhibited, and witnesses examined to prove the

(l) *Vide Vigers v. Lord Audley*, 9 Sim. 408. (o) *Catton v. Earl of Carlisle*, 5 Mad. 427.  
(m) 5 Sim. 8. (p) 1 Harr. (ed. Newl.) 69.  
(n) 1 Harr. (ed. Newl.) 69. (q) *Ibid.*

(1) See *Pedrick v. White*, 1 Metcalf, 76, cited ante, 1677, note.

**Evidence upon** matters in issue in the original cause, as well as those in issue in the supplemental suit (s). Where, however, publication has passed, it will be irregular to examine witnesses as to matters in issue in the original suit, and if any are examined as to such matters, the depositions cannot be read at the hearing (t).

**Depositions taken in original suit may be read upon.** It is to be recollected, that a supplemental suit is merely a continuation of the original suit, and that whatever evidence was properly taken in the original suit, may be made use of in both suits, even though not entitled in the supplemental suit : thus depositions taken in the original suit, may be read at the hearing of both causes, and this was permitted in a case where the original bill was filed by the plaintiff, a married woman, in a wrong name, (*i. e.* as the widow of the testator, when her husband by a previous marriage was living,) and the object of the supplemental bill was to correct this error, and to bring her husband before the Court (u).

**Title of the suit.** Where a woman being defendant marries, it seems that the husband should be brought before the Court by supplemental bill, and then the cause may proceed without alteration of the title (x).

It is also laid down that, in cases of alienation, *pendente lite*, the alienor is bound by the proceedings in the suit after alienation and before the alienee became a party to it ; and depositions of witnesses, taken after the alienation and before the alienee became a party, may be used by the other parties against the alienor, as they might have been used against the party under whom he claims (y).

**Form of Interrogatories.** If interrogatories are exhibited after supplemental bill filed, they should be entitled in both suits, unless the supplemental bill is merely filed against a new party for the purpose of bringing him before the Court, in which case, if the original defendants are not parties to the supplemental bill, they may, even after the supplemental bill has been filed, entitle their interrogatories in the original cause only (z). The case will, however, be different, if they join in a commission to examine witnesses, or consent to an order for such commission which is entitled in the two suits ; in such case, the title of the interrogatories, and depositions must follow the title of commission, otherwise the depositions will be suppressed for irregularity (z).

**Where there has been no decree in the original suit.** If there has been no decree in the original suit before the supplemental bill is filed, the original and supplemental suit may come

(s) Vide Lloyd v. Johnes, 9 Ves. 37; and ante, p. 1667-8.

(t) Bagnall v. Bagnall, 12 Vin. Ab. 114, Pl. 9.

(u) Giles v. Giles, 1 Keen, 635.

(x) Sapte v. Ward, 1 Coll. 14.

(y) Lord Red. 56; vide Garth v. Ward, 2 Atk. 174.

(z) Vide Pritchard v. Foulkes, 2 Beav. 133.

(z) Ibid.

on for hearing together, (unless the supplemental bill is merely for discovery,) and one decree will be made in both (a). But if a decree has been obtained before the event by which the supplemental bill was rendered necessary, though it be only a decree nisi (b), there must be a decree on the supplemental bill, for the which purpose the supplemental cause must be set down for hearing alone; or it may be heard with the original cause for further directions (c), in order to which, if necessary, the Court will, upon application, order the supplemental cause to be advanced (d) (1).

Hearing.

Where there has been a decree in origin suit.

## SECTION II.

### *Bills in the Nature of Supplemental Bills.*

A SUPPLEMENTAL bill, as we have already seen, is a mere continuation of the original suit, by or against a party having or acquiring the interest of a former party, and in fact forms, together with the original bill and proceedings under it, but one record. Cases, however, frequently occur in practice, in which the interest of an original party to the suit is completely determined, and another party becomes interested in the subject-matter, by a title not derived from the original party, but in such a manner as to render it but just and reasonable that the benefit of the former proceedings should be had by or against such other party, without incurring the expense and risk of commencing an entirely new proceeding. The course of the Court, therefore, provides that, in such cases, the benefit of the former proceedings may be obtained, by means of a bill called "*An original Bill in the Nature of a supplemental Bill*" (2).

Original bill in the nature of supplemental bills.

The cases in which a bill of this description is required, may be collected from what has been already stated (c); and it is sufficient, therefore, at present, to recall to the reader's recollection

In what case they lie.

- (a) Lord Red. 64-75; *John v. ney-general v. Hurst*, ib. 132.  
 Brown, Seton on Decrees, 385. (d) Ibid. and vide Hand, 108.  
 (b) Lord Red. 64. (e) Ante, p. 1666.  
 (c) Seton, 386; and vide Attor-

(1) If the supplemental bill has been improperly or unnecessarily filed, it will be dismissed at the hearing, although the plaintiff obtains a decree on the original bill. *Eager v. Price*, 2 Paige, 339.

(2) Story Eq. Pl. § 345, 346

Form of Supplemental Bill.

bill was filed, or has become so under a new title but derived from a former party, as in the case of a necessary party omitted, and subsequently brought before the Court by supplemental bill, or of a new party coming into *esse* after the original bill is filed : there the supplemental bill is, in fact, an original bill as against the new defendant, and must state enough of the case to put the title of the plaintiff, to relief against such new defendant in issue ; for as a defendant, who was not a party to the original bill, coming in upon a new title, cannot be called upon to answer the original bill (z), there is no other method by which the plaintiff's title to maintain the suit, as against him, can be put in issue, than by a statement of it in the supplemental bill. It is, however, to be observed, that, for this purpose, the mere statement of the former proceedings has been held sufficient to put the facts of the case in issue with regard to this sort of defendant (y), i. e., "you may, in the supplemental bill, state that you have made such a representation in the former bill, instead of representing the facts in the second bill" (z). In the case of the Attorney-general v. Foster (a), the supplemental information was against new defendants, and under such circumstances, that Sir J. Wigram, V. C., did not consider they were bound by the former proceedings in the cause. The supplemental information did not state the facts in the original information ; whereupon it was contended that, as it tendered no other issue than whether the defendants were bound by the proceedings in the original bill, if the defendants were not bound by such proceedings, the Court must dismiss the supplemental information, but could make no decree upon the merits of the original information. Sir J. Wigram, apparently with some difficulty, overruled the objection, holding that this brief statement sufficiently put the whole case in issue against the new defendants.

What statement sufficient to put the whole case in issue against a new defendant.

Recital of former bill against a new defendant.

Moreover, in *Vigers v. Lord Audley* (b) the V. C. of England held, before the 49th Order, that even where a supplemental bill is filed against a new defendant, it is not necessary to state in it all the circumstances of the case at length ; all that is requisite is, that the plaintiff should state so much of the case as shows that he has an equity against such defendant. In that case, the plaintiffs, who were members of a joint-stock company, had filed a bill against the directors, and obtained an injunction against them.

(z) *Baldwin v. Mackown*, 3 Atk. 817. It is, however, usual to call upon a new party who ought to have been a party to the original bill to answer that original bill. It does not, however, seem clear, that he is either bound or entitled to take an office

copy of it, see post, 1679-80.

(y) *Lloyd v. Johnes*, 9 Ves. 37.

(z) *Ibid.*

(a) 2 Hare, 81, and see post.

(b) 9 Sim. 72.

reasoning, that the observation of Lord Redesdale, though general, is not universal, and that in laying it down as a rule that, in the case of an original bill in the nature of a supplemental bill, the depositions, pleadings, &c., cannot be used in the same manner as upon an original bill in the nature of a bill of revivor, his Lordship does not intend to assert that, in an original bill in the nature of a supplemental bill, the pleadings and depositions in the first cause cannot be used, but merely that they cannot be used *in the same manner* (o). This is Lord Eldon's view of the matter, and his Lordship goes on to add, that "the difficulty arises from the negative proposition, without explaining the precise idea that belongs to it" (p); with deference, however, the author begs to suggest, that the precise idea entertained by Lord Redesdale, may be very distinctly ascertained by reference to the definition of "an original bill in the nature of a supplemental bill," as already pointed out; from which it may be collected, that it is, in fact, not a supplemental bill, (in which case, from its being a mere continuation of the former suit, the pleadings and depositions in such former suit, would have been as much evidence as they would have been in the original suit,) but another original bill, in which the pleadings and evidence in the original suit can only be made use of, in the same manner and under the same limitations and restrictions as the proceedings in one suit are, in ordinary cases, capable of being admitted as evidence in another. The confusion upon this point has, in fact, as it appears to the author, arisen from considering a bill of this nature more in the light of a supplemental bill than of an original bill, in which latter light, Lord Redesdale evidently views it; for if we assume that it is, in its nature, an original bill, it is obvious that, when he lays it down, that in an original bill in the nature of a supplemental bill, the pleadings and depositions in the former cause cannot be used in the same manner as if filed or taken in the same cause, his meaning is, that if you wish to use the pleadings and depositions in the first cause, as evidence in the second, you must obtain an order to do so; as in the ordinary case of reading the pleadings and depositions belonging to one suit, in another (q), and that, when they are tendered as evidence, their admissibility will depend upon the same rules with regard to privity, &c., as have been already pointed out with regard to the admissibility of the pleadings and evidence in one cause, in another where the suits are distinct (r).

Original Bill  
in the Nature  
of Supplemental  
Bills.

Distinction  
between such  
bills and orig-  
inal bill in na-  
ture of bills of  
revivor.

(o) Lloyd v. Jones, 9 Ves. 55.

(p) Ibid.

(q) Vide ante, p. 1009; vide etiam,

Backhouse v. Middleton, cited ib. p. 1015.

(r) Ibid. p. 1010.



Original Bills  
in the Nature  
of Supplemental  
Bills.

Form of.

Supplemental  
bill in the  
nature of a  
bill of review  
requires the  
leave of the  
Court.

So also, with regard to the decree, Lord Redesdale says that if any has been obtained, it is no otherwise of advantage than as it may be an inducement to the Court to make a similar decree (*s*); this is precisely the effect which a decree in one original cause would have, in *pari materia*, in another cause; whereas the effect of a decree in a suit purely supplemental, would be to bind those parties who are affected by it, by means of their privity of interest.

An original bill in the nature of a supplemental bill, must state the original bill, the proceedings upon it, the event which has determined the interest of the party by or against whom the former bill was exhibited, and the manner in which the property has vested in the person become entitled. It must then show the ground upon which the Court ought to grant the benefit of the former suit, to or against the person so become entitled, and pray the decree of the Court adapted to the case of the plaintiff in the new bill (1). The form of a bill of this description underwent considerable discussion before the V. C. of England, in *Woods v. Woods* (*t*), in which his Honor decided, that where such a bill is exhibited against new defendants, in consequence of the death of a former defendant, it will not be impertinent on the mere ground that it restates the allegations of the original bill. His Honor was also of opinion, that it was competent to the plaintiff, in such a bill, to state allegations in the answer of the defendant who has died, and to charge new matter for the purpose of meeting the defence in that answer, though such new matter might relate to circumstances anterior to the filing of the original bill, and might have been introduced by amendment of the original bill, as against that defendant if he had lived.

It must be recollected that a supplemental bill in the nature of a bill of review cannot be filed without the leave of the Court having been first granted (*u*). In order to obtain permission for this purpose, a petition must be presented, supported by an affidavit to show that the "new matter could not be produced or used by the party claiming the benefit of it at the time when the decree was made. If the Court is satisfied that the new matter is relevant, and material, and such as might probably have occasioned a differ-

(*s*) Lord Red. 73.

(*t*) 10 Sim. 99. This case was decided before the 49th Order of Aug. 1841, issued, but it does not seem that that Order has affected the decision, see ante, p. 1675; see also At-

torney-general v. Foster 2 Hare, 81, ante, p. 1667.

(*u*) Hodson v. Ball, 1 Ph. 177, ante, p. 1662; Davis v. Bluck, 6 Beav. 393.

(1) Story Eq. Pl. § 353.

ent determination, it will permit a bill of review to be filed " (x) (1). If a supplemental bill in the nature of a bill of review is filed without the leave of the Court, we have seen that it may be taken off the file for irregularity (y). The bill prays "That the cause may be heard with respect to the new matter made the subject of the supplemental bill at the same time that it is reheard upon the original bill, and that the plaintiff may have such relief as the nature of the case made by the supplemental bill requires" (z).

Proceedings  
upon.

The proceedings upon a bill of this description are the same as those upon original bills in general.

There is another description of bill known in practice, which, although classed by Lord Redesdale amongst bills in the nature of original bills, is still so far supplemental in its nature as to render a short notice of it, in this place, not improper. The bill alluded to is what is termed by Lord Redesdale, "*a bill to carry a decree into execution*" (2).

Bill to carry  
a decree into  
execution.

A bill of this description is proper where, after a decree has been pronounced, it has happened that, owing to some neglect of the parties to proceed upon the decree, their rights have become so embarrassed by subsequent events, that no ordinary process of the Court upon the first decree will serve, and it is therefore necessary to have another decree of the Court to ascertain and enforce them. Thus where a decree was pronounced against a defendant, to have a settlement delivered up, and a perpetual injunction, and afterwards the plaintiff died, having made a will, and thereby bequeathed all her estate to trustees, to be sold for the payment of her debts and legacies, the creditors and legatees were obliged to file a bill against the devisee of the former defendant, who was dead, to have the benefit of the decree obtained by the plaintiff, in order that the estate might be sold, and their debts and legacies paid (a).

In what cases  
proper.

Where rights  
have become  
so embarrassed  
that original  
decree cannot  
be proceeded  
upon.

Sometimes such a bill is exhibited by a person who was not a

Where person

(x) Lord Red. 94. The passage quoted has reference to a bill of review, but the same proof is requisite to obtain leave for a supplemental bill in the nature of a bill of review, Lord Red. 91.

(y) Ante, p. 1662.

(z) Lord Red. 91.

(a) Johnson v. Northey, Prec. in Ch. 134; 2 Vern. 407, S. C.; vide etiam, 2 Chan. Rep. 228.

(1) See post, ch. 30. So if a bill of revivor and supplement in the nature of a bill of review. Pendleton v. Fay, 2 Paige, 204.

(2) Story Eq. Pl. § 429 to 432.

He to carry  
decrees into  
Execution.

party to  
original suit,  
or claiming  
under one,  
asks the ben-  
efit of it.

party, nor claims under any party, to the original decree, but claims in a similar interest or is unable to obtain the determination of his own right till the decree has been carried into execution (b). A bill of the former description was attempted in *Rylands v. Latouche* (c), which has been before referred to, and another has been since more successfully prosecuted, in *Oldham v. Eboral* (d), before Lord Brougham. In that case a suit had been instituted by certain legatees of a testatrix, (who had been formerly married to a Mr. Oldham,) against her executor, for an account, amongst other things, of the rents and profits of certain houses and lands at Calcutta, which were supposed to have been part of her personal estate; but, upon doubts having been suggested as to the tenure of the houses and land, and whether, in fact, they were not the real estate of Mr. Oldham, the first husband of the testatrix, a supplemental bill was filed for the purpose of raising that question against the Attorney-General and the East India Company, on an allegation that the plaintiffs had been unable to ascertain who was Mr. Oldham's heir at law. Upon the hearing it was, amongst other things, referred to the Master to ascertain the tenure of the property, and if he should be of opinion that it was freehold, to inquire and state to the Court, who was the heir at law of Samuel Oldham. Under this reference, the Master reported that the houses and land were freehold, and he also reported that he was unable to ascertain who was the heir at law, &c., but upon a subsequent reference, a person of the name of Eboral established his claim as heir at law *ex parte materna*, and was reported to be so by the Master, who also reported that there were no heirs *ex parte paterna*. Whereupon a supplemental bill was filed, by the original plaintiffs, against Eboral, as the heir at law of Oldham, upon which there was a decree giving them the benefit of all the former proceedings, against Eboral, as if Eboral had been originally a party to the suit, and dismissing the bill against the Attorney-General and the East India Company. The result of the case was, that the property in India was declared to be freehold, and the possession thereof decreed to Eboral. Subsequently, however, it was discovered that other persons were the heirs at law, *ex parte paterna*, of Oldham, and these persons having established their claim, filed the present bill against Eboral and the other parties on the record to the former suit, praying to have the benefit of the proceeding in the former suit, and that the same might be reversed so far as the title of Eboral was thereby set up

(b) Lord Red. 95.

(c) 2 Bligh, 566.

(d) 1 Cooper's Sel. Cases, Temp. Brougham, 27.

in opposition to them in their character of heirs at law, and upon this cause coming on to be heard before Lord Brougham, he eventually made the decree sought for by the bill.

Bills to carry  
Decrees into  
Execution.

There is no doubt that the decree, in the above case, was perfectly correct; but it is to be remarked, as somewhat singular, that the bill upon which it was founded appears, from the printed reports, to have been treated, as well in the argument as in the judgment, as an original bill in the nature of a supplemental bill, and not, as it in fact was, a bill to carry the former decree into execution by a person *who was not a party, nor claimed under any party to the original decree, but claimed in a similar interest.*

A bill of this description may also be brought by or against a person claiming as assignee of a party to the decree. This appears to have been the nature of the bills in *Organ v. Gardiner* (e) and in *Lord Carteret v. Paschal* (f); and the case of *Binks v. Binks* (g), which has been already referred to (h), may perhaps be considered as coming more within the description of this class of bills than that of a supplemental bill.

By a person  
claiming as  
assignee of a  
party.

Such a bill may, also, be brought to carry into execution the judgment of an inferior Court of Equity, if the jurisdiction of that Court is not equal to the purpose, as in the case of a decree by the Court of Great Session in Wales, (before the abolition of those Courts,) which the defendant had avoided by flying into England (i).

To carry into  
execution  
decree of an  
inferior Court

It is to be observed that, in the case last referred to, the Court thought itself entitled to examine into the justice of the decision, though it had been affirmed in the House of Lords; and it is laid down, that, although where a decree is capable of being executed by the ordinary process and forms of the Court, whatever the iniquity of the decree may be, yet, till it is reversed, the Court is bound to assist it with the utmost process the course of the Court will bear; but, where the common process of the Court will not serve, and things come to be in such a state and condition after a decree made, that it requires an original bill, and a second decree upon that, before the first decree can be executed, if the first decree is unjust, then this Court desires to be excused in making it its own act, and to build upon such foundations, and charging

Whether the  
justice of the  
original decree  
may be im-  
peached on  
such a bill.

*Semble*, it may

(e) 1 Ch. Ca. 231.  
(f) 3 P. Wms. 197; and vide *Paschal v. Thurston*, 2 Bro. P. C. ed. Toml. 10 S. C.  
(g) 2 Bligh, P. C. 593.  
(h) Ante, p. 1664.  
(i) Lord Red. 96; *Morgan v. —*, 1 Atk. 408.

Bills to carry  
Decrees into  
Execution.

— and that  
the original  
decree is open

Whether upon  
such a bill the  
original decree  
may be rever-  
sed.

Original bill  
can only be  
objected to by  
the defendant  
in the new  
suit.

its own conscience with promoting an apparent injustice ; and this obliges the Court to examine the grounds of the first decree, before it makes the same decree again (*k*).

The principle above laid down was acted upon in *Johnson v. Northey* (*l*), where a bill was filed by the creditors of a deceased party to have the benefit of a decree, by which the defendant, who claimed under a settlement of certain real estates, made by the plaintiff's ancestor, was ordered to deliver up the settlement as having been revoked ; and Lord Keeper Wright held that the creditors having brought their bill to execute the decree, had opened it, and directed an issue to try whether the deed was revoked or not. So also, in the case of *Worden v. Gerard* (*m*), the interest of an infant party being affected by the decree, the Court refused to carry it into execution upon a bill for that purpose, and made a decree according to the rights of the parties. And in *West v. Skip* (*n*), Lord Hardwicke, although he considered the general rule to be, that, on a bill of this nature the Court can only carry the former decree into execution, yet, as there were several instances in which the Court had considered the directions, and whether there was any mistake, as had been done by Lord Cowper to attain the justice of the case, he held it might be done in the case before, and decreed accordingly.

The question whether, upon a bill to carry a decree into execution, the propriety of the original decree might be examined, or impeached, or the decree varied, was much discussed before the House of Lords, in *Hamilton v. Houghton* (*o*), in which a decree, which was erroneous, was reversed, upon a bill of this description, notwithstanding there had been a very long acquiescence.

It is to be observed, however, that although the original decree may be controverted upon a bill to carry it into execution, it is only the defendant, in the new suit, who can call it into question, the plaintiff never can (*p*) ; he must, if dissatisfied with the decree, impeach it either by bill of review or by some proceeding of that nature (*q*).

In the case of *O'Connell v. M'Namara* (*r*) Lord Chancellor Sugden said, "I do not understand the rule to be, that this Court

(*k*) Vide *Lawrence v. Berney*, 2 Cha. Rep. 127.

(*l*) Prec. in Ch. 134 ; 2 Vern. 407, S. C. ; vide etiam, Attorney-general v. Day, 1 Ves. 218.

(*m*) Cited Lord Red. 96, n. •  
(*n*) 1 Ves. 239.

(*o*) 2 Bligh, P. C. 169.

(*p*) *Robinson v. Robinson*, 2 Ves.

225, 232.

(*q*) Vide *Shepherd v. Titley*, 2 Atk

348.

(*r*) 3 Dr. & Warren, 411.

is bound to carry into execution an erroneous decree; on the contrary, I apprehend, that when a party comes into this Court asking for the benefit of a former decree, he must be prepared to show, if the case requires it, that such decree was right." Accordingly he refused to give the plaintiff the benefit of the former proceedings unless he consented to take the proper decree.

Bills to carry Decrees into Execution.

A bill, of the description above alluded to, is, generally, "partly an original bill and partly a bill in the nature of an original bill though not strictly original; and sometimes it is, likewise, a bill of revivor, or a supplemental bill, or both (s); and the frame of the bill and the course of proceedings upon it vary accordingly." Practice upon

Form of.

Practice upon

It is right here to notice another class of bills mentioned by Lord Redesdale, which are in their nature supplemental, though classed by his Lordship amongst bills in the nature of original bills. The bills alluded to are termed "*Bills to suspend or avoid the operation of decrees*" (t). They appear, however, to be adapted only to contingencies arising from public events, and as the instances of these which are to be found in the books (u), originated chiefly by the embarrassments occasioned by the great rebellion in the reign of Charles I. and the state of affairs after his death, they are to be considered with much caution.

Bills to suspend or avoid the execution of decrees.

### SECTION III.

#### *Bills of Revivor.*

WHERE a suit is perfect in its original formation, but afterwards becomes discontinued or imperfect by abatement, the general method of continuing it, or of remedying the defect, is by *Bill of Revivor* (1).

In what manner abated suits may be revived.

Where an abatement takes place before decree signed and entered a bill of revivor is the only proceeding, which the practice of the Court furnishes, by which the suit may be continued; but, if the decree is not signed, a bill of revivor may be filed, or, after decree entered, a bill of revivor may be filed.

By bill of revivor. — or, after decree in-

(s) Lord Red. 97.

(t) Ibid. 94.

(u) Cocker v. Bevis, 1 Ch. Ca. 61; Venables v. Foyle, ibid. 3; Whorewood v. Whorewood, ib. 250; Wake-

lin v. Waltham, 2 Ch. Ca. 8.

(1) Story Eq. Pl. § 354; as to the difference in effect between an abatement of a suit at common law and of a suit in Equity. See ib.

No Revivor for  
Costs.  
rolled, by  
*scire facias*.

if an abatement occurs after a decree signed and enrolled, the party wishing to continue it may proceed either by bill of revivor or by a subpœna in the nature of a *scire facias*, which is an ancient process, upon the return of which, the party to whom it is directed may show cause against reviving the decree (*u*), by insisting that he is not bound by it (*x*), or that, for some other reason, it ought not to be enforced against him, or that the person, suing out the subpœna, is not entitled to the benefit of the decree. If, upon cause being shown, the opinion of the Court is in his favor, he will be dismissed with costs (*y*); if it is against, or if he does not oppose the reviving of the decree, interrogatories may be exhibited for his examination touching any matter necessary to the proceedings. If he opposes the reviving of the decree on the ground of facts which are disputed, he must also be examined upon interrogatories, to which he may answer or plead; and, upon issue being joined and witnesses examined, the matter may be fully heard and determined by the Court. It is to be observed, however, that, if there has been any proceeding subsequent to the decree, this process will be ineffectual, as it revives the decree only (*z*), and the subsequent proceedings cannot be revived but by bill; and, for this reason and from the inrolment of decrees being now much disused, the course of proceeding by *subpœna scire facias* has fallen into disuse, and it is become the practice to revive in all cases, indiscriminately, by bill (*a*) (1).

Practice of re-  
viving by  
*scire facias*  
now discon-  
tinued.

No revivor for  
costs.

It may be observed in this place, that, in general, the Court will not permit a suit to be revived for the purpose of deciding the question of costs only (*b*) (2). The general rule being, that if a

(*u*) Ward v. Lake, 3 Cha. Rep. 15. Where a decree has been made in more suits than one, an abatement may be remedied by one bill of revivor, Moore v. Elkington, 2 Beav. 574.

(*x*) Brown v. Bermuden, 1 Cha. Ca. 272.

(*y*) Ibid.

(*z*) 2 Ch. Rep. 67.

(*a*) Lord Red. 69.

(*b*) Lord Red. 201; For. Rom. 181.

(1) Story Eq. Pl. § 366. In Vaughan v. Wilson, 4 Hen. & Munf. 480, it was held, that a bill of revivor is unnecessary, where a mere revival of the suit is sought; a *scire facias* being sufficient.

(2) A bill of revivor cannot properly be brought upon a bill of discovery merely, after the answer is put in and the discovery is made; for in such a case the entire object of the suit has been obtained; and the plaintiff can have no motive for reviving it; and the other party has no interest in reviving it. Story Eq. Pl. § 371a; Horsburg v. Baker, 1 Peters, 232, 236.

A bill of revivor will not lie to revive a motion. Hendrix v. Clay, 2 A. K. Marsh. 464.

party die, *before taxation* of costs, there can be no revivor in respect of costs only against his personal representatives (c) (1). No Revivor for Costs.

The rule does not, of course, apply where any thing else is directed by the decree which remains unexecuted. "If, by the decree," says Lord Chief Baron Gilbert, "the party is to pay a sum of money, or if a duty is decreed, if he is to deliver over a bond, or deed, or writings, or if any thing is annexed to the decree besides costs, the suit may be revived" (d). Permitted where there is any thing remaining to be performed.

It is to be remarked, also, that the rule applies only to costs which remain untaxed at the time when the abatement takes place. Where the costs have been actually taxed, and the Master's certificate signed, there may be a revivor for them (e), because, when taxed, they become a judgment debt, and as at Law you may revive a judgment so you may here (f). But, in order to entitle a party to revive, the taxation must have been complete by the Master's having signed his certificate, otherwise the costs will be considered as untaxed. It is true that, in *Morgan v. Scudamore*, Lord Rosslyn appeared to doubt whether he should not direct the report to be entered *nunc pro tunc* (g), but, upon the case coming before him a second time, he seems to have abandoned that ground and to have taken a broader one (h). — or where they have been actually taxed; but taxation has been complete.

It is right also to mention, that, in *Tucker v. Wilkins* (i), where the plaintiff's solicitor, at the request of the defendant's solicitor, had agreed to postpone the taxation of costs decreed to be paid to the plaintiff, on an undertaking that the plaintiff should not be prejudiced thereby, and the plaintiff died after the costs were taxed, but before the Master's certificate had been signed, whereupon his representatives filed a bill of revivor stating the facts before mentioned, and praying, under the usual order to revive, that the defendants might pay the amount of the plaintiff's costs, and that the Master might be at liberty to make his certificate *nunc pro tunc*, and date it before the death of the plaintiff,—upon a plea being put in to this bill on the part of the defendant, Permitted where taxation has been postponed by arrangement.

- (c) Vide Beames on Costs, (ed. 1840), p. 131, and the cases cited in the note. cases there cited, notis.  
 (d) For. Rom. 181; Johnson v. Peck, 2 Ves. 465. (f) Ibid.; Edgill v. Brown, 1 Dick. 62; Blower v. Morrets, 3 Atk. 772; Loader v. Price, 2 Fowler's Ex. Pr. 309.  
 (e) Lowten v. Corporation of Colchester, 2 Mer. 114; and vide Beames on Costs, (ed. 1840,) p. 132; and the (g) 2 Ves. J. 313.  
(h) 3 Ves. 195; vide next page.  
(i) 7 Sim. 349.

(1) Story Eq. Pl. § 371. See, however, *Travis v. Waters*, 1 John. Ch. 85. If the whole ground of the suit has been removed by the death of the plaintiff, the Court will not hear an argument merely to determine the question of costs. *Johnson v. Thomas*, 2 Paige, 377.



Revivor for  
Costs.

the V. C. of England held that the agreement stated in the bill amounted, in fact, to an agreement that the suit should be revived. But it is to be remarked that the circumstances of that case were very special, and cannot in any way be considered as impugning the general rule which has been laid down.

No difference  
whether abate-  
ment occurs  
by death of  
party to pay,  
or of party to  
receive costs.

A distinction has been attempted to be made between an abatement by the death of the party to pay the costs, and an abatement by the death of the party to receive them, holding in the latter case, that there may be a revivor for costs (*k*); but in *Jupp v. Gearey* (*l*), Sir John Leach, V. C., held on demurrer, that if the plaintiff dies before the costs of a bill dismissed are taxed, a bill of revivor by the defendant against his representatives for costs cannot be sustained (*1*).

Exceptions  
where costs  
to be paid out  
of estate or  
fund

The only exceptions to the general rule above laid down, that *there can be no revivor for costs only, which have not been taxed before the abatement happened*, are where they are directed to be paid out of a particular estate or fund (*m*), or are decreed against an executor out of assets (*n*) (*2*), in which cases they are considered as a charge or lien upon the estate, and not upon the person, and, therefore, do not come within the principle of Courts of Law, (on analogy to which the rule is founded,) that "*actio personarum moritur cum persona*."

Cases where  
bill of revivor  
sufficient.  
Transmission  
to legal rep-  
resentative.

With respect to the species of abatement which may be remedied by bill of revivor, it is laid down, that whenever a suit abates by death, and the interest of the person whose death has caused the abatement, is transmitted to that representative which the Law gives or ascertains, as an heir at law, executor, or administrator, so that the title cannot be disputed, at least in the Court of Chancery, but the person in whom the title is vested is alone to be ascertained, the suit may be continued by bill of revivor merely (*3*);

(*k*) Beames on Costs, (ed. 1840,) p. 133; 2 Ves. J. 313; 3 Ves. 195; see *Kemp v. Mackrell*, 3 Atk. 812; 2 Ves. 580, S. C.; *Johnson v. Leake*, cited 3 Atk. 773.

(*l*) 5 Mad. 375.

(*m*) *Blower v. Morrets*, 3 Atk. 772; (*n*) Beames on Costs, (ed. 1840,) p. 132.

(1) See Story Eq. Pl. § 371; *Travis v. Waters*, 1 John. Ch. 85.

(2) Story Eq. Pl. § 370, 371.

(3) Story Eq. Pl. § 364; *Nicoll v. Roosevelt*, 3 John. Ch. 60; *Feomster v. Markham*, 2 J. J. Marsh. 303.

Where a bill in Equity to redeem mortgaged premises is abated by the death of the plaintiff, his heirs may renew the suit by a bill of revivor. *Putnam v. Putnam*, 4 Pick. 139. See *Pell v. Elliott*, 1 Hopk. 86; *Thompson v. Hill*, 5 Yerger, 418; *Douglass v. Sherman*, 2 Paige, 358; *Randolph v. Dickenson*, 5 Paige, 517.

In a suit for the rescission of a contract for lands, if the plaintiff dies, it should be revived in the name of the heirs, and not of the executors. If the

so also, if a suit abates by the marriage of a female plaintiff, and no act is done to affect the rights of the party but the marriage, no title can be disputed; the person of the husband is the sole fact to be ascertained, and therefore the suit may be continued in this case likewise, by bill of revivor merely (o). Where Bill of Revivor not allowed. Marriage of female plaintiff.

It is generally necessary, in order to entitle a party to revive, that there should be a privity between him and the individual whose death has caused the abatement: it is upon this ground held, that where the interest of a plaintiff suing in *autre droit*, determines, the suit must be continued by supplemental bill, and not by bill of revivor (p). It seems, however, that the rule will not hold where a man files a bill as administrator and dies; in such cases, the administrator *de bonis non* may sustain a bill of revivor, although there is no actual privity between him and the original plaintiff (q). In general there must be privity of estate.

If, however, upon the abatement happening, the interest of the party does not vest in any representative which the law gives or assigns, as in the case of bankruptcy or insolvency, or of a devisee of real estate, the suit cannot be continued by bill of revivor, but must, where the abatement is caused by the bankruptcy or insolvency of a defendant, be continued by supplemental bill, which, in this case, is called a *supplemental bill in the nature of a bill of revivor* (r). So, where the suit is abated by the bankruptcy or in- Where abatement cannot be remedied by revivor. Where interest of party dying

(o) [Story Eq. Pl. § 364; Douglass v. Sherman, 2 Paige, 358.] As to the abatement and continuation of suits by married women, vide ante, p. 145. The reader is reminded here, that where a female defendant marries, no abatement takes place, but the husband ought to be named in all future proceedings, ante, p. 201.

(p) Ante, p. 4, 1665.

(q) Lord Red. 64, n. (R), refers to Huggins v. York Buildings Comp. 2 Eq. Ca. Ab. 3, and Owen v. Curzon, 2 Vern. 237; see vide the note in Mr. Raithby's edition.—It is to be re-

marked, that the last mentioned case, supposing it to be correct, does not bear out the proposition in the text, in its full extent, inasmuch as the ground given for the decision (viz. that it comes within the meaning of statute 30 C. II. c. 6,) limits it to a case in which there has been a decree in the original suit; it is apprehended, however, that the *dictum* of Lord Redesdale is fully supported by the other case referred to. See vide Cooper's Eq. Pl. 76, and Story's Eq. Pl. 252.

(r) Ante, p. 1671-2.

defendant dies, it is error to take a decree against his heirs till they are served with process, or have answered. Kincart v. Sanders, 2 A. K. Marsh. 26. See Hallett v. Hallett, 2 Paige, 16; Bradford v. Felder, 2 M'Cord Ch. 169; Kellar v. Beelor, 5 Monroe, 574; Wilkinson v. Perrin, 7 Monroe, 217; Smith v. Manning, 9 Mass. 422; Coons v. Nall, 4 Litt. 264; Jackson v. Freyer, 4 Paige, 51.

A suit for usury must be revived in the name of the executor or administrator, and not in the name of the heir. Meek v. Ealy, 2 J. J. Marsh. 331.

Death of Parties.  
 does not vest in an acknowledged representative.

solvency of a sole plaintiff, his assignees cannot, as we have seen, continue the suit by bill of revivor, but must do so by *original bill in the nature of a supplemental bill* (s). So also, in a suit relating to land, where a plaintiff dies, having devised the land which is the subject of the litigation, the suit must be continued by the devisee by another species of bill, called *an original bill in the nature of a bill of revivor*, and not by bill of revivor (t) (1).

The same rule applies to abatements occasioned by the death of parties defendant as well as of parties plaintiff (u); therefore, a bill of revivor will not lie against the devisee of a defendant, but the suit must be continued against him in the same manner that it is continued by the devisee of a plaintiff (x).

Where defendant dies before appearance.

It is to be recollected, that, till a defendant has appeared, there is no cause in Court against such defendant (y), therefore, if a defendant dies before appearance, the suit cannot be continued against his personal representative, by bill of revivor, but a bill ought to be filed against such personal representative, which will be an original bill as far as respects him, but a supplemental bill with respect to the suit (z).

In what cases death of party does not cause abatement.

It may be noticed here, that it is not every death of a party to a suit which occasions such an abatement as will suspend the proceedings, and that if the interest of the party dying so determines that it can no longer affect the suit, and no person becomes entitled thereupon to the same interest, which happens in the case of a tenant for life, or a person having a temporary or contingent interest, or an interest defeasible on a contingency, the suit does not so abate as to require any proceeding to warrant the prosecution of the suit against the remaining parties; but if the party dying be the only plaintiff or only defendant, there may be necessarily an end of the suit, no subject of litigation remaining (a) (2).

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|------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------|
| (s) Ante, p. 1666.                                                                             | (x) Lord Red. 71.                                                                                                                   |
| (t) Lord Red. 71; Backhouse v. Middleton, 1 Cha. Ca. 175; 3 Cha. Rep. 39 b.; vide post.        | (y) Ante, p. 1673.                                                                                                                  |
| (u) Page v. Page, Mos. 44, cites 1 Cha. Ca. 174, 231, 123; 2 Vern. 548, 672; 1 Vern. 426, 283. | (z) Crowfoot v. Mander, 9 Sim. 396, and vide Asbee v. Shipley, Mad. & Geld. 296; Stewart v. Nicholls, Taml. 307, and ante, p. 1673. |
|                                                                                                | (a) Lord Red. 58.                                                                                                                   |

(1) Slack v. Wolcott, 3 Mason, 308; Douglass v. Sherman, 2 Paige, 358; Russell v. Craig, 3 Bibb, 377.

If the suit abates, after a decree affecting both real and personal property, it may be revived either by the heirs or personal representatives. Owing's case, 1 Bland, 409.

(2) Story Eq. Pl. § 356.

Also, if the whole interest of the party dying survives to another party, so that no claim can be made by or against the representatives of the party dying, as if a bill be filed by or against joint-tenants, and one dies, the suit may be continued by or against the survivor, without revivor (*b*); and where the suit is by or against trustees or executors, and one dies, not having possessed any of the property in question, or done any act relating to it which may be questioned in the suit, or by or against husband and wife, in right of the wife, and the husband dies under circumstances which admit of no demand by or against his representatives, the proceedings do not abate, although, as we have already seen, the wife is not bound to continue the suit, unless she thinks proper to do so (*c*) (*2*).

Death of Parties.

Where interest survives to another,

So, if a surviving party can sustain the suit, as in the case of several creditors, plaintiffs, on behalf of themselves and other creditors, no bill of revivor is necessary, because the representatives of the deceased plaintiff may come in under the decree (*d*). It is to be observed, however, that although, in such case, no revivor is necessary, yet if one of the original plaintiffs, in such a suit, dies after the decree, his personal representative may, if he thinks proper, revive the suit; thus, in *Burney v. Morgan* (*e*), where the original bill was filed by Burney on behalf of himself and of all the other creditors, under a trust deed, against a purchaser, in which Morgan, who was an incumbrancer upon the trust estate, joined, and, upon the hearing, a decree was made, establishing the agreement for sale of the estate, and directing the Master to take the accounts usual in a creditor's suit, it happened that Burney died, whereupon his personal representative filed a bill of revivor against Morgan and the other defendants; Morgan afterwards died, and upon his death his personal representatives filed a bill of revivor, (making the representative of Burney a defendant as well as the other defendants,) and then moved the Court that the personal representative of Burney might be restrained from proceeding in her bill of revivor, and that he alone might prosecute the decree. Upon hearing the motion, Sir J. Leach, V. C., held, that although it was true that the death of Burney, who was co-plaintiff as a judgment creditor, did not abate the suit, because

or where surviving party can sustain the suit, as in the case of creditors suing on behalf of themselves and others; but representatives of deceased creditor may revive.

(*b*) *Fallowes v. Williamson*, 11 Ves. 369; *Boddy v. Kent*, 1 Mer. 364; but the case is different in the case of tenants in common, *ibid*.

(*c*) Lord Red. 59, et vide ante, p. 146; [Story Eq. Pl. § 357, § 358.]

(*d*) *Boddy v. Kent*, ubi supra.

(*e*) 1 S. & S. 358.

(1) See *Vaughan v. Wilson*, 4 Hen. & Munf. 452.

Who entitled  
to revive.

the other plaintiff, Morgan, could effectually prosecute the decree, and had full interest to do so until his debt was satisfied; yet he had no interest in the further prosecution of the suit for the benefit of the judgment creditors, and that the personal representative of Burney had, therefore, a right to claim by revivor, the same power of prosecuting the suit for the benefit of the judgment creditors as Burney himself possessed.

Before decree.  
Where sole  
plaintiff dies.

Where an abatement of a suit takes place before decree, the only persons entitled to revive, where the abatement has occurred by the death of a sole plaintiff, is the representative, real or personal, as the case may be, of such plaintiff, unless, indeed, the bill was originally filed by the plaintiff in a representative capacity, viz., as executor or administrator of a person deceased, in which case the party to revive will be the individual in whom the representation of the deceased person is vested, and not the representative of the original plaintiff, unless such representative is also clothed with the character of representative of the original testator or intestate: thus, if a bill is filed by the administrator of a creditor who dies, the bill of revivor must be filed not by his personal representative, but by the administrator *de bonis non* of the creditor (*f*).

— or one of  
several plain-

If the abatement has occurred in consequence of the death of one of several plaintiffs, the suit may be revived by the representative of the deceased plaintiff, either in conjunction with or separately from the surviving plaintiffs, who must, however, be parties (*g*).

It seems also, that where one of several plaintiffs dies, unless the interest of the deceased plaintiff survives to the others, the suit becomes wholly abated, so that it is necessary to make all the parties to the original suit, parties to the bill of revivor (*h*); but one of the surviving plaintiffs may, if the surviving plaintiffs refuse to join, file a bill of revivor alone, making the other surviving plaintiffs who refuse to join, as well as the representatives of the deceased plaintiffs, defendants to the revivor (*i*). And where, upon the death of a defendant, one of three plaintiffs, who had become his representative, filed a bill of revivor against the other

(*f*) *Huggins v. York Buildings* Comp. 2 Eq. Ca. Ab. 3; vide ante, p. 1697, n. (*g*). If in a case of this nature, a suit has been revived by a wrong party, the proper course to be pursued by the right party, is to revive *de novo*, *ibid.*; and vide *Ryland v. Latouche*, 2 Bligh, 566.

(*g*) *Fallowes v. Williamson*, 1 Ves. 309.

(*h*) *Clare v. Cork*, 2 Y. & C. 131.

(*i*) *Finch v. Lord Winchelsea*, 1 Eq. Ca. Ab. 2.

two plaintiffs, who appeared, and afterwards filed another bill of revivor, the second bill of revivor was ordered to be taken off the file, and the order to revive made upon it was discharged, but without costs (k). Who entitled to revive

It may be noticed here, that, in the case of a bill by a corporation sole, the death of the plaintiff occasions an abatement, but that a material distinction arises with respect to the person entitled to revive or continue the suit. If the plaintiff was entitled to the subject-matter for his own benefit, the suit may be revived by his personal representative (l); but if the plaintiff was only entitled in his corporate capacity, for the benefit of himself and successors, his successor is the person who ought to continue the suit, which he must do by means of an original bill in the nature of a supplemental bill (m). On death of corporation sole.

When the abatement is occasioned by the marriage of a female plaintiff, the suit may be revived by the husband and wife jointly; or, if the property in litigation be the wife's separate property, the bill of revivor must be filed on the part of the wife by her next friend. The bill, however, in such case, can hardly be a bill of revivor alone, but must be accompanied by a supplementary statement to show the settlement under which the wife became entitled to a separate estate. Or marriage female plaintiff.

Where the abatement has occurred by the death of a defendant before decree, the suit can only be revived by the plaintiff or those claiming under him; and it is to be observed that in no case, before decree, can a defendant or those claiming under him revive a suit. We have seen, however, that in certain circumstances a defendant, though he cannot revive the suit, may obtain an order that the plaintiff or his representatives may revive within a limited time, or that the bill may be dismissed (n). Defendant cannot revive before decree.

It may be here observed, that the 39th Order of 1828, directs, "That where any cause shall become abated, or shall be compromised after the same is set down to be heard in either of the said two Courts, the solicitor of the plaintiff shall also certify the fact, as the case may be, to the Registrar of the Court where the cause is so set down, who shall cause an entry thereof to be made in his cause book." When suit is abated, notice to be given the Registrar.

(k) *Livesey v. Livesey*, 1 R. & M. 10.

(l) *Vide ante*, p. 28.

(m) *Ibid.*; it is there stated that, in such case, the successor is the person who ought to revive; this, however, is inaccurately expressed, since it is one of those cases in which the

suit cannot be continued by bill of revivor, or even by a mere supplemental bill, but the benefit of it must be obtained by original bill, in the nature of a supplemental bill, as stated in the text.

(n) *Ante*, p. 954.

Who entitled  
to revive.

If an abatement takes place after decree, and the plaintiff files a bill of revivor, but neglects to obtain the order to revive upon the expiration of the usual time, the defendant may, if himself entitled to a bill of revivor, move that the suit may be revived, and that he may be at liberty to carry on the suit (*o*).

After decree.  
Defendant  
may ;

And although the general rule is strict, that before decree, a defendant cannot sustain a bill of revivor, the case is different after decree, and the suit may be revived at the instance of a defendant, if the plaintiffs, or those standing in their right, neglect to do it ; for then the rights of the parties are ascertained, and plaintiffs and defendants are equally entitled to the benefit of the decree, and have a right to revive it (*p*) (1).

or his repre-  
sentative,

So also, if the abatement occur by the death of a defendant, the suit may be revived at the instance of his representative (*q*).

provided he  
has an interest.

Attempts have been made to limit the right of a defendant to revive, to cases in which there has been a decree for an account, in support of which a *dictum* of Lord Hardwicke, in an anonymous case in *Atkyns* (*r*), has been relied upon ; but it seems to be now held, that it is not in cases of account only, that a defendant can revive, but that he may do so wherever he has an interest (*s*). He must, however, have some interest under the decree, that is, an interest in the further prosecution of the suit :—where the object of the revivor is not to continue the suit, but merely to put an end to an injunction, and to be allowed to proceed at Law, a bill of revivor by the defendant will be liable to a demurrer (*t*), and the defendant must proceed to get rid of the injunction in the ordinary way (*u*).

*Secus*, where  
no interest.

Defendant  
need not give  
notice to plain-  
tiff before re-  
viving.

It does not appear to be necessary for a defendant, who wishes to revive a suit after a decree, to give notice of his intention to do so to the plaintiff's representatives, although, as we have seen (*x*) , the rule is different with respect to supplemental bills.

Effect of re-  
vivor by  
defendant.

It is to be observed, that a bill of revivor, by a defendant, merely substantiates the suit, and brings before the Court the parties necessary to see to the execution of the decree, and to be

(*o*) *Whitebear v. Hughes*, 1 Dick. 283.

(*r*) 3 Atk. 691.

(*p*) Lord Red. 79 ; *Kent v. Kent*, Prec in Ch. 197 ; 2 P. Wms. 263, n. ; Anon. 3 Atk. 691 ; *Lady Stowell v. Cole*, 2 Vern. 296 ; *Lord Stowell v. Cole*, ibid. 219 ; [Story Eq. Pl. § 372.]

(*s*) *Finch v. Lord Winchelsea*, 1 Eq. Ca. Ab. 2.

(*t*) *Horwood v. Schmedes*, 12 Ves. 311.

(*u*) Ibid. and vide post.

(*x*) Ante, p. 1673 ; *Phillipps v. Clarke*, 7 Sim. 231 ; and vide *Livesey v. Livesey*, 1 R. & M. 10.

(*q*) *Williams v. Cooke*, 10 Ves. 401.

(1) After a decree to account either party may revive. *Griffith v. Bro- naugh*, 1 Bland, 548.

the objects of its operations rather than to litigate the claims made by the several parties in the original pleadings, except so far as they remain undecided (*y*). And it does not appear, that the necessary effect of a revivor by a defendant, will be to take from the plaintiff the conduct of the cause, without an application to the Court, or to the Master, in the manner already pointed out (*z*).

Effect of Revivor.  
Upon conduct of cause.

It is said by Lord Redesdale (*a*), on the authority of *Finch v. Lord Winchilsea* (*b*), that, in the case of a bill by creditors on behalf of themselves and other creditors, any creditor is entitled to revive; it seems, however, that, in practice, the form of the bill, in such case, is that of a supplemental bill in the nature of a bill of revivor, and not of a mere bill of revivor (*c*), we have seen, however, that where one of several creditors, plaintiffs in a suit for the administration of assets, dies, the representative of such creditor may sustain a bill of revivor, although no actual abatement of the suit has taken place (*d*).

In the case of creditors.

With respect to the persons against whom a bill of revivor should be exhibited,—if the abatement has been caused by the death or marriage of a sole plaintiff, and the suit is to be continued by the representatives of the original plaintiff, or by the husband and wife, all the defendants to the original bill must be parties to it (*e*); and so they must, if the abatement has been caused by the death or marriage of one of several plaintiffs, and the suit is continued by the surviving plaintiffs and the representatives of the deceased plaintiff (*f*), or by the husband and wife in conjunction with the other plaintiffs. If the suit is continued, either by the surviving plaintiffs alone, or by the representatives of the deceased plaintiff alone, the surviving plaintiffs in the other, must be made defendants to the bill of revivor, in conjunction with the original defendants: thus, if one of several tenants in common, plaintiffs, dies, and a bill of revivor is filed by his representatives, the survivor, if not a co-plaintiff, must be a defendant (*g*); and so, if in the case of the marriage of a female, one of several plaintiffs, the suit is continued either by the husband and wife alone, or by the other plaintiffs alone, the other plaintiffs in the one case, or the husband and

Parties against whom bill of revivor must be filed.  
Where sole plaintiff or one of several plaintiffs dies or marries.

(*y*) Lord Red. 79.

(*z*) Ante, p. 1348.

(*a*) Lord Red. 79.

(*b*) 1 Eq. Ca. Ab. 2.

(*c*) Vide *Houlditch v. Marquis of Donegall*, 8. & S. 491, 494; and ante, p. 1673,

(*d*) *Dixon v. Wyatt*, 4 Mad. 392;

ante, p. 1699.

(*e*) But if a defendant who has not answered is omitted, it will not be a ground of demurrer. *Oxburgh v. Fincham*, 1 Vern. 308.

(*f*) *Cave v. Cork*, 2 Y. & C. 130.

(*g*) *Fallowes v. Williamson*, 11 Ves. 306.



Against whom wife in the other, must be defendants as well as the original de-  
Suit revived. fendants.

Where de-  
fendant dies.

Where the abatement is caused by the death of a defendant the only parties necessary to be made defendants to the bill of revivor, are the representatives of the deceased defendant (1).

After decree.

Where a bill of revivor is filed, after decree, all persons interested in carrying the decree into execution must be made parties to the bill of revivor. The bill, however, will not be liable to demurrer for want of a party who was not before the Court at the time of the abatement, although the suit may have been imperfect for want of such party, for it is not the office of a bill of revivor to correct such imperfection (h).

Where de-  
fendant has  
disclaimed.

It is to be mentioned in this place, that it may be necessary to revive a suit against the personal representatives of a deceased defendant, although such defendant has disclaimed and the plaintiff is willing to waive all relief against him. Thus, where a defendant had been a party to a bill exhibited for an account of partnership dealings between himself and the plaintiff and the other defendants, and died, having put in a disclaimer to the bill, in consequence of which no bill of revivor was filed against his representative; upon an objection being taken at the hearing, because such representative was not a party, Sir John Leach, M. R., held, that the cause could not proceed without him; because, as the accounts would be taken for the benefit of all the partners, there might, in the result, be liabilities as between the deceased partner and his co-defendants, which the waiver of the plaintiff could not affect (i).

On death of  
husband.

It is said that if a bill be exhibited against *baron and feme*, and the husband dies, the suit is abated, and a bill of revivor must be exhibited against the wife, because she is not obliged to abide by the answer which was put in for her under the power of her husband (k): this, however, does not appear to be correct, unless where a new interest arises to the wife upon the death of her husband, in which case, as we have seen, a supplemental bill must be filed against the wife, for the purpose of affording her an opportunity of putting in another defence in respect of her newly acquired interest (l).

(h) *Metcalf v. Metcalf*, 1 Keen, Russ. 458.

74. (k) For Rom. 175.

(i) *Glassington v. Thwaites*, 2 (l) Vide ante, p. 201.

(1) It is said, that if a suit abates by the death of the defendant, the plaintiff may bring a new original suit, or a bill of revivor, at his election; for he may be able to make a better case than by his first bill. Story Eq. Pl. (3rd ed.) § 354, note; *Nicoll v. Roosevelt*, 3 John. Ch. 60.

It must be observed, however, that where a suit is founded on contract, the parties to that contract or their representatives are in general the only necessary parties; where, therefore, a bill was filed to set aside a contract that had been entered into by a defendant for the sale of his wife's estate, to which bill the wife was not party, and the defendant died, whereupon the suit was revived against his personal representative, it was contended that the wife ought to have been made a party to a bill of revivor, as she had an interest in enforcing the contract, but Sir T. Plumer, M. R., overruled the objection (*m*). It is, nevertheless, to be recollected that, where a man and his wife are defendants, if the wife dies, there will be an abatement of the suit, and that the administrator of the wife must be made a party by revivor (*n*).

Against whom  
Suit revived.

Where wife  
not party,  
though con-  
tract relates to  
her estate.

In the above-mentioned case of *Humphrey v. Hollis* (*o*), it was decided, that where a bill was retained with liberty to the plaintiff to bring an action against one of the defendants, for the purpose of trying the validity of the contract, and no direction was given as to the other defendants attending the trial, the circumstance of the action having been tried after the death of one of such other defendants, and before the suit had been revived against his representatives, did not prejudice the trial, although it would have been different if the other defendants had been directed to attend (*p*).

Where action  
at law directed  
against one of  
several de-  
fendants.

It may be noticed here, that a suit which has become entirely abated may be revived as to part, only, of the matter in litigation, as to part, by one bill, and as to the other part, by another: thus, if the rights of a plaintiff in a suit, upon his death, become divided, partly in his real and partly in his personal representative, the real representative may revive the suit so far as concerns his title, and the personal so far as his demand extends (*q*).

May be for  
part of matter  
in litigation.

But although a suit may be revived as to part of the matter in litigation, it cannot be revived as to part of the proceedings, — so that a revivor cannot be made to operate from a particular period of the cause only, but the whole proceedings, bill, answer, and orders made in the cause, must stand revived; for the revivor is not a continuance of the same suit, and it cannot be a continuance of the same unless it proceeds from where the other left off (*r*).

— but not as  
to part only of  
proceedings.

With respect to the form of a bill of revivor, the 49th Order of Form of bill  
of revivor.

(*m*) *Humphreys v. Hollis*, Jac. 73.

(*n*) *Ante*, p. 201.

(*o*) *Ubi supra*.

(*p*) *Ante*, p. 1321-2.

(*q*) Lord Red. 80; *Ferrers v. Cherry*, 1 Eq. Ca. Ab. 3, 4; [Story Eq. Pl. § 367.]

(*r*) For. Rom. 174.

Form of  
Bill of RevivorWhat must be  
stated.

## Prayer.

— that de-  
fendant may  
admit assets,  
&c.,— and an-  
swer original  
bill,

August, 1841 (1), has, as we have seen (s), directed that it shall not be necessary, in any bill of revivor, to set forth any of the statements in the pleadings in the original suit, unless the special circumstances of the case may require it.

Before this Order, it seems to have been right to set out sufficient to show the plaintiff's title to revive, and probably this practice ought still to be continued under the Order (t). A bill of revivor must state the original bill, and the several proceedings thereon, and the abatement and the plaintiff's title to revive (z), and charge that the cause ought to be revived and stand in the same condition, with respect to the parties in the bill of revivor, as it was in with respect to the parties to the original bill at the time the abatement happened; and it must pray that the suit may be revived accordingly, or that the defendant may show good cause to the contrary (y). It may, likewise, be necessary to pray, that the defendant may answer the bill of revivor, as in the case of a requisite admission of assets by the representative of a deceased party (z). In this case, if the defendant does admit assets, the cause may proceed against him upon an order of revivor merely; but, if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estate of the deceased party, to answer the demands made against it by the suit; and the prayer of the bill, therefore, in such case, usually is, not only that the suit may be revived, but also that, in case the defendant shall not admit assets to answer the purposes of the suit, those accounts may be taken, and so far the bill is in the nature of an original bill (a) (2).

“If a defendant to an original bill dies before putting in an answer, or after an answer in which exceptions have been taken, or after an amendment of the bill to which no answer has been given, the bill of revivor, though requiring in itself no answer,

(s) Ante, p. 1675.

(t) Phelps v. Sproule, 4 Sim. 318; and vide Vigers v. Lord Audley, 9 Sim. 72, and ante, p. 1675; For. Rom. 209.

(z) Lord Red. 75. As to the man-

ner of stating a plaintiff's title, where it is derived under a probate or letter of administration, vide ante, p. 363.

(y) Lord Red. 75.

(z) Ibid.

(a) Lord Red. 77.

(1) The Supreme Court of the United States have adopted the same rule in Rule 47 of their Equity Rules, January Term, 1842.

(2) Story Eq. Pl. § 374.

Upon a bill of revivor, the sole questions before the Court are, the competency of the parties to revive, or the correctness of the frame of the bill. *Bettes v. Dana*, 2 Sumner, 383.

A bill of revivor, when necessary, may be filed of course, without an order of the Court granting permission to file it. *Pendleton v. Fay*, 3 Paige, 204.

ust pray that the person against whom it seeks to revive the suit <sup>Process.</sup> <sup>how enforced,</sup> ay answer the original bill, or so much of it as the exceptions <sup>Process.</sup> <sup>how enforced,</sup> ken to the answer of the former defendant extend to, or the amendments remaining unanswered " (b).

If the suit seeks merely to revive the suit, it prays simply for a — for sub-  
bpœna to revive: if it requires an answer, as in the case of a pœna.  
ll against an executor requiring him to admit assets, it shall pray  
subpœna to revive and answer.

A bill of revivor or the draft of it must be signed by counsel, Signature of  
nd the process of filing it is the same as that of filing an original counsel,  
ill (c). filing, &c.

The form of the subpœna upon a bill of revivor is the same as Subpœna.  
hat issued upon an original bill (d), except that it states the na-  
ure of the bill to which the defendant is required to appear. It  
s sued out and served in the same manner as an ordinary subpœna — how sued  
e), and in the case of a peer, &c., it must be preceded by a let- out, served,  
er missive, the service of which must be accompanied by a copy &c.;  
of the bill (g) (1).

If a defendant, having been served with a subpœna, neglect to Appearance of  
ppear to a bill of revivor within eight days after the service of defendant.  
he subpœna, he becomes liable to the ordinary process of con-  
empt for want of appearance (h). It is, however, competent to  
he plaintiff to enter an appearance for the defendant, in like  
manner as to an original bill, should he think fit so to do (i). In  
the event of the defendant appearing himself to the bill, the plain-  
tiff may avail himself of the provisions of the 61st Order of May,  
1845, which directs, that " The plaintiff in a bill of revivor, or of After appear-  
revivor and supplement, is entitled as of course upon motion or ance when  
petition to the common order to revive, if a defendant, having ap- order to re-  
peared in person, or by his own solicitor, does not within eight vative may be  
days after such appearance plead or demur to the whole bill, or to obtained.  
so much thereof as prays the revivor."

The 12th article of the 16th Order is similar in effect, direct-  
ing, " That a defendant who has appeared in person or by his  
solicitor, and desires to show cause against an order to revive be-

(b) Ibid.; [Story Eq. Pl. § 325.]

(c) Ante, p. 453.

(d) Ante, p. 496.

(e) Ante, p. 499.

(g) Ante, p. 531. If the peer is re-

quired also to answer original bill, he  
must also be served with a copy of  
such original bill, ante, p. 501.

(h) Ante, p. 517-8.

(i) Ibid.

(1) It is error to proceed to a decree on a bill of revivor without process on  
the bill of revivor executed. Sweet v Bigg, 5 Litt. 17; Shields v. Craig,  
6 Monroe, 373.

Orders to re-  
vive.

Order only ap-  
plies after ap-  
pearance by  
defendant.

Process where  
a defendant  
omits to appear  
himself.

ing made, has for that purpose only eight days after such appearance, within which he is to plead or demur to bill of revivor.

If he does not plead or demur within such eight days, the plaintiff is entitled as of course to the common order to revive."

These Orders do not seem to have effected any change in the previous practice, which was regulated by the 10th Order of December, 1833, now discharged. It will be observed that they apply only when a defendant appears himself to a bill of revivor, they do not extend to the case of an appearance being entered for a defendant by the plaintiff. Moreover, if an answer to the bill of revivor is required, the defendant's obedience to the *subpæna*, must be enforced by the ordinary process of contempt.

The last mentioned Order moreover only applies when the defendant has been served with a *subpæna*; if he absconds, the plaintiff may proceed against him in the same manner as is before pointed out when the defendant to an original bill absconds.

The 62nd of the Orders of May, 1845, provides for the case when, after due service of a *subpæna* upon the defendant, the plaintiff enters an appearance on him; it directs "That if the plaintiff in a bill of revivor and supplement, has caused an appearance thereto to be entered for any defendant against whom it is sought to revive the suit; and such defendant does not within eight days after such appearance, plead or demur to the whole bill, or to so much thereof as prays the revivor, the Court may, if it thinks fit, make the common order to revive upon motion, such motion being made on notice, to be served on such defendant, as other notices of motion, if such defendant was a party to the suit, at the time of the abatement thereof; but if such defendant was not a party to the suit at such time, then such motion is to be made on notice served on such defendant personally, unless it appears on affidavit that the plaintiff is unable or ought not to be bound to serve such notice personally, by reason of such defendant being out of the jurisdiction, or being concealed, or for any other cause, and if it appears to the Court that the plaintiff cannot or ought not to be bound to serve such notice personally, then upon notice otherwise served or published as the Court may direct."

Under these Orders, the plaintiff may in all cases obtain an order to revive, unless the defendant shows sufficient cause to the contrary; and it may be observed that, wherever the suit abates, whether the abatement requires merely a bill of revivor or of revivor and supplement, the suit must be revived by an order to re-

ve, and it is not in general regular to wait till the hearing, and Orders to re-  
ven to revive the suit by decree (*k*). vive.

We have seen that, now, under certain circumstances, the de- — if not ob-  
ndant can, upon the abatement of a suit, move that it may be tained by  
revived within a limited time, or that the bill may be dismissed plaintiff, de-  
(*l*). It would seem, therefore, that if a plaintiff, after filing a bill fendant may  
f revivor, should neglect to obtain the order to revive, a similar move to dis-  
motion might be made. After decree, as the defendant may him- miss.  
self revive, probably he may also obtain an order to revive upon — or, after  
the plaintiff's bill (*m*). decree, obtain  
order himself.

All orders for the revival of proceedings must be regularly Service of  
served, but it does not seem that personal service is requisite (*n*). order,

It will be observed, that the form of the General Orders of May, only prevented  
(1845 (*o*), is such as to make it incumbent upon a defendant, by demurrer  
irous to show cause against an order to revive, either to plead or plea.  
lemur to the bill (*l*); he cannot show cause by answer, so as to  
revent an order to revive being obtained. This is similar to the  
practice before the Orders issued. In fact the putting in of an  
answer has always been treated as a submission to the suit being  
revived, upon which, notwithstanding any thing that may be con-  
tained in the answer, it is a matter of course to draw up the order  
to revive (*p*) (*2*).

But, although a defendant cannot, by answer, prevent the revi- Defendant  
ring of the suit, he may, if required to answer the bill, controvert may by an-  
the plaintiff's title to revive in his answer, and, if he does so, swer contro-  
vert plaintiff's  
and succeeds in showing, at the hearing, that the plaintiff was title to revive.  
not entitled to revive, the plaintiff will take nothing by his suit (*p*).

A bill of revivor is liable to demurrer if it does not show a suffi- Demurrer to  
cient ground for reviving the suit (*q*), or any part of it (*r*), either bill of revi-  
by or against the person by or against whom it is brought (*s*). vor (*3*).

(*k*) 1 Smith, 668, 3rd ed.; see post, 465; Codrington v. Houlditch, 5 Sim.  
1713. 286.

(*l*) Ante, p. 954.

(*m*) Ante, p. 1702.

(*n*) 1 Harr. (ed. Newl.) p. 71.

(*o*) 62nd Order, last page.

(*p*) Harris v. Pollard, 3 P. Wms.  
448; Lewis v. Bridgman, 2 Sim.

(*p*) Harris v. Pollard, 3 P. Wms.  
348; Lord Red. 77.

(*q*) Harris v. Pollard, ubi supra;  
Humphreys v. Incledon, 1 Dick. 38.

(*r*) 1 Eq. Ca. Ab. 3, 4.

(*s*) University Coll. v. Foxcroft, 2  
Ch. Rep. 244.

(1) Pendleton v. Fay, 3 Paige, 204.

On a bill to revive or enforce a former decree, the first decree cannot be  
questioned. Dunlap v. M'Ilvoy, 3 Litt. 273.

(2) Pendleton v. Fay, 3 Paige, 206, cited ante, 1706, note.

(3) Story Eq. Pl. § 617, et seq. § 829.

**Orders to Re-  
vive.**

A demurrer will also lie to a bill of revivor brought singly for costs which have not been taxed, unless in those cases which come within the exceptions to the general rule on this subject which have been before pointed out (*t*). The want of parties is also a ground for demurring to a bill of revivor, though, as we have seen, it cannot be demurred to for want of a party who was not before the Court at the time of the abatement (*u*); or who has not appeared to the original bill (*x*).

**Pleas.**

If a bill of revivor is brought without sufficient cause to revive, and this is not apparent on the bill, the defendant may plead the matter necessary to show that the plaintiff is not intitled to revive the suit against him (*y*); or, if the plaintiff is not intitled to revive the suit at all, though a title is stated in the bill so that the defendant cannot demur, the objection to the plaintiff's title may, also, be taken by way of plea (*z*) (1).

**Of the Stat. of  
Limitations,  
21 Jack. I. c.  
16.**

The question whether a plea of the Statute of Limitations, will apply to bill of revivor, has been the subject of considerable discussion. Lord Redesdale, however, states (*a*), "That if a person, intitled to revive a suit, does not proceed in due time, he may be barred by the Statute of Limitations, which may be pleaded to a bill of revivor afterwards filed." In support of this proposition, however, his Lordship refers to Hollingshead's case (*b*), which, although a case in point as to the general principle, yet establishes a very important distinction (*c*), viz., that where the bill of revivor is after a decree to account, it is not within or barable by the Statute of Limitations: though the demand may be a very stale one, and not to be encouraged (2).

**Will not apply  
after decree to  
account.****Will not hold  
on same  
ground as plea  
to original bill  
which has  
been over-  
ruled.**

It is to be recollected, that a defendant to a bill of revivor cannot plead to the original bill a plea which has been pleaded by

(*t*) Ante, p. 1696; Ld Red. 201.

(*u*) Metcalfe v. Metcalfe, 1 Keen, 74; ante, p. 1704; [Story Eq. Pl. § 624.]

(*x*) Ante, p. 1698.

(*y*) Ld. Red. 289; Harris v. Polard, 3 P. Wms. 348.

(*z*) Ibid.

(*a*) Lord Red. 290.

(*b*) 1 P. Wms. 743.

(*c*) Vide etiam, Hovenden v. Lord

Annesley, 2 Sch. & Lef. 607; Egremont v. Hamilton, 1 B. & B. 524; Onge v. Truelock, 2 Moll. 31. It seems, however, that, after a great lapse of time, it is in the discretion of the Court to be regulated by circumstances, whether relief shall be given. Hollingshead's case, ubi supra; Hovenden v. Lord Annesley, ubi supra; Lord Egremont v. Hamilton, ubi supra.

(1) Story Eq. Pl. § 829, et seq.

The want of proper parties may also be objected to a bill of revivor. Story Eq. Pl. § 830; Bettes v. Dana, 2 Sumner, 383.

(2) See Story Eq. Pl. § 831.

the original defendant and overruled, although if a plea has been put in, and the original defendant has died before argument, the defendant may plead the same matter *de novo* (d). Pleas to  
Bill of Revivor

Pleas and demurrers, as well as answers, to bills of revivor are subject to the same rules, as well of pleading as of practice, as pleas and demurrers to original bills.

It seems to have been thought that a defendant could only object to a revivor by way of plea or demurrer (e), and there may be great convenience in thus making the objection, for, as we have seen, if the defendant objects by answer, it will not prevent the order to revive (f), and the point can only be determined by bringing the cause regularly to a hearing; whereas, if the objection is taken by plea or demurrer, it may, in general, be immediately determined in a summary way (g), and before the order to revive has been obtained, provided the plea or demurrer be filed within eight days after appearance (h) (1). Answer to  
bill of revivor.

But although where an answer is called for, the defendant may, by it, object to the revivor, yet, if it be a mere bill of revivor, in which the question between the parties is simply as to the right to revive, an answer, unless required by the bill, is unnecessary. When an answer is required, it must be confined to such matters as are called for by the bill or would be material to the defence with reference to the order made upon it. Upon this ground it has been held, that where a defendant to a bill of revivor inserted in his answer a variety of matters which, if stated in answer to the original bill, might have been a good defence to that bill, but was not relevant to the question of revivor, the answer was to that extent impertinent (i). And so, where the answer to a bill of revivor set out a detailed account of the proceedings which had taken place in the suit for the purpose of objecting to them as irregular and oppressive, and it was insisted that some of the orders which had been made in the cause ought to be set aside, and that money which had been paid out of Court under them brought back; it was held, upon exceptions to the Master's report, Where proper.  
  
Impertinent  
to state  
matters which  
would have  
been a defence  
to original bill.

(d) Ante, p. 804.

(e) *Harris v. Pollard*, 3 P. Wms. 308.

(f) Ante, last page.

(g) Lord Red. 289.

(h) Ante, p. 1708-9.

(i) *Nanney v. Totty*, 11 Price, 117; [Story Eq. Pl. § 370 (a).]

(1) Story Eq. Pl. § 829.



Answers to  
Bills of Revi-  
vor.

Where matters  
of defence  
have arisen  
since original  
bill.

Exceptions for  
impertinence  
and insuffi-  
ciency.  
Not allowed  
after order to  
revive.

Signature of  
counsel.  
Filing, &c.

Replication,

after cause at  
issue or decree.

Setting down  
for hearing.

upon a reference for impertinence, that such statements in the answer were impertinent (*k*).

An answer, however, to a bill of revivor will not be impertinent, if it states matters of defence which have occurred since the answer to the original bill was filed, although such matters do not affect the title of the plaintiff to revive; therefore, where the defendants to a bill of revivor, in addition to answering the statements in the bill, stated that they had become bankrupts, and had obtained their certificates, and claimed the benefit of the statutes in force relating to bankrupts, and the plaintiffs excepted to this part of the answer for impertinence, the V. C. of England confirmed the Master's report overruling the exceptions (*l*).

An answer to a bill of revivor is liable to exceptions for impertinence and insufficiency the same as an answer to an original bill; but it is to be noticed, that if an executor or administrator, by his answer, admits assets, and the plaintiff, upon coming in of the answer, revives his suit, and proceeds in the original cause upon the revivor, he shall never afterwards refer the answer for insufficiency; "for this he ought to have done at first, and before he proceeded to revive the original cause; his doing whereof is an admission that the answer was full and perfect, or otherwise he might have excepted thereto, and had the opinion of the Court thereon; but then he could not have proceeded to revive till he had got over that point" (*m*).

An answer to a bill of revivor, like all other pleadings, must be signed by counsel, and may be put in and filed in the same manner as other answers, which it resembles in all other points.

If the answer does not admit the plaintiff's title to revive, or state any circumstances which the plaintiff is desirous of controverting, it must, if the abatement has taken place after decree, or after issue joined in the original cause, be replied to, after which the proceedings upon it will be the same as upon an original bill (*n*).

If the bill of revivor is filed before decree, or before issue joined in the original cause, a separate replication will be unnecessary, and the revived suit and the original suit may be set down upon one certificate (*o*).

(*k*) *Wagstaff v. Bryan*, 1 R. & M. 28.

(*l*) *Langley v. Overton*, 10 Sim. 345.

(*m*) For. Rom. 180.

(*n*) 1 Smith, 669, 3rd edit. The Orders of May, 1845, do not mention

a bill of revivor expressly; but would seem probable that the defendant has the same time for answering as to an original bill; see ante, p. 84.  
(*o*) *Catton v. Earl of Carlisle*, Mad. 427; et vide 1 Smith, 670, 3rd edit.

With respect to the necessity for setting down a bill of revivor for hearing, it must depend upon whether the object of the bill has been accomplished by the order to revive. If it merely prays that the suit may be revived, a hearing will be unnecessary, as the object will be completely effected by the order to revive ; and if, under such circumstances, the revivor suit is brought on for hearing, the plaintiff will have to pay the costs. This will apply equally to cases in which the bill of revivor is filed by the plaintiff, or those who represent him, or after decree, by a defendant, or those who represent him, the mere order to revive will, in such case, be effectual against both plaintiffs and co-defendants (p). Hearing when necessary.  
In what cases unnecessary.  
Not where object attained by order to revive.  
Whether suit revived by plaintiff or defendant.

It is, however, to be observed, that, although where a bill seeks a revivor only, a mere order to revive will obviate the necessity for setting down the revivor for hearing, this will not be the case if the defendant is called upon to answer, and by his answer controverts the right to revive. In such case the revivor suit must be set down for hearing, notwithstanding the order to revive has been obtained (q) ; and it is to be noticed, that, wherever the bill contains supplemental matter, as well as matter of revivor, a hearing will be necessary ; and that, the bill of revivor must in such case, be set down for hearing, as well against the party to the revivor, as against the party to the supplemental matter. Thus, where a bill was filed, which was supplemental against the heir, but was a mere bill of revivor with respect to the administratrix, against whom the common order to revive had been made, the V. C. of England held that the cause must be set down to be heard against the administratrix as well as against the heir, although if it had been a simple bill of revivor against the administratrix, a hearing would have been unnecessary (r).

If the bill of revivor prays for an admission of assets by the representative of a deceased party, and the defendant admits assets, the cause may proceed against him, upon the order of revivor merely ; but, if he does not make that admission, the cause must be heard for the purpose of obtaining the necessary accounts of the estates of the deceased party, to answer the demands made against it (s). Where defendant admits assets.  
Secus, where he does not.

If the bill of revivor is filed before the decree, it may, if the original cause has not been set down for hearing, be set down together with it, but if the original cause has been already set down, it must be set down separately, and, in respect to all fees Where suit revived before decree ;

(p) *Pruen v. Lunn*, 5 Russ. 3. (r) *Lake v. Austwick*, 4 Jurist, 314.  
(q) *Harris v. Pollard*, 3 P. Wms. (s) *Ld. Red.* 76.  
348 ; *Seton on Decrees*, 385.

When necessary to be set down. and charges, it is considered as a separate cause until the decree (*t*).

—after decree. If there has been a decree in the original cause, the bill of revivor must, if necessary to be heard, be set down separately, or it may be so set down that it shall come on for hearing with the cause upon further directions.

When *subpœna* to hear judgment in original suit necessary, It may be mentioned here, that where an abatement takes place after the original cause has been set down, and the *subpœna* to hear judgment served, and the suit is afterwards revived by order, no new *subpœna* to hear judgment is necessary in the original cause (*u*), unless there are new parties introduced by the revivor, in which case, such new parties must be served with a *subpœna*, although the other defendants need not (*x*).

in revived suit. If the abatement is general, and it is necessary to set the bill of revivor down for hearing, *subpœnas* to hear judgment in the revivor suit must be served, even though it may not be necessary to serve *subpœnas* in the original suit (*y*).

Effect of abatement. It may be useful to the practitioner, before concluding this section, to direct his attention to some of the ordinary effects of abatement and revivor, upon the proceedings in the cause.

Where it is total. Where the abatement is total, *i. e.*, where it is caused by the death, bankruptcy, insolvency, or marriage of the plaintiff (being a female), the cause is completely suspended and cannot be proceeded in, till it has been revived, or the defect, caused by the abatement, cured by supplemental bill (1); and, in general, all orders made pending such abatement, will be considered nugatory, and may be discharged. The same rule will also apply where the abatement has been caused by the death of one or more plaintiffs. Thus if, pending a total abatement, process of contempt is issued, it will be irregular, and may be discharged on motion with costs, and if a defendant is arrested on any process pending such abatement, he will be discharged from such arrest, with costs (*z*). So, also, an order to dismiss a bill for want of prosecution, obtained pending an abatement, will be irregular (*a*).

(*t*) 1 Smith, 670, 3rd edit.

(*u*) *Bray v. Woodran*, Mad. & Geld. 72; *sed vide contra*, Cockburn v. Raphael, 4 Sim. 18.

(*x*) 1 Smith, 403.

(*y*) *Ibid.*

(*z*) *Wilson v. Metcalfe*, MSS.

(*a*) *Sellars v. Dawson*, 2 Anst. 458.

(1) See *Johnson v. Thomas*, 2 Paige, 377, cited *ante*, 1695, note.

It is to be observed, however, that, although the general rule is as above stated, there are many cases in which the Court will entertain applications although the suit is abated (1). Thus it will entertain a motion to discharge process of contempt issued or executed pending an abatement; so also, although no regular order to dismiss a bill for want of prosecution can be obtained before revivor, the Court is now enabled, if the plaintiff's representatives omit to revive the suit within a reasonable period, to make an order that they shall file a bill of revivor within a limited time, or else that the bill shall be dismissed (b).

Effect of Abatement.  
Secus, applications to discharge process of contempt irregularly issued or taken, — or to compel the revivor within a limited time.

It has, also, where the right to money in Court has been clear under former orders and reports, made an order upon petition for payment of the money out of Court, to the party entitled, without regarding the abatement (c) (2), or for the delivery of deeds and writings brought into Court, or it will send it to the Master for inquiry to whom they belong (d).

Money paid out of Court pending abatement.

We have seen also, that a commission to examine witnesses abroad will not be affected by an abatement of the suit, and that depositions taken under it (provided neither the Commissioners nor the witnesses have received notice of the abatement), will be good (e).

Examination of witnesses abroad permitted.

An inrolment of a decree may also be made, and an order to do so, *nunc pro tunc*, may be made, notwithstanding an abatement (f).

Decree in-rolled pending abatement.

Where, however, the suit abates after a decree has been pronounced, but before it is passed, there must be a revivor before it can be passed (g).

But not passed or entered.

It is to be recollected that the Statute of Limitations will run, pending an abatement, in all cases except a decree to account (h).

For the effect of an abatement upon a sequestration to enforce an answer to a decree, the reader is referred to former parts of the present Treatise (i).

Effect upon sequestration.

- |                                     |                                              |
|-------------------------------------|----------------------------------------------|
| (b) Ante, p. 954.                   | son v. Took, <i>ibid.</i> 115; Peter v. Rob- |
| (c) Roundell v. Curren, 6 Ves. 250; | inson, <i>ibid.</i> 116.                     |
| vide etiam, Beard v. Earl Powis, 2  | (f) Ante, p. 1226.                           |
| Ves. 399.                           | (g) Bertie v. Ld. Falkland, 1 Dick.          |
| (d) Wharam v. Broughton, 1 Ves.     | 25.                                          |
| 185.                                | (h) Hollingshead's case, 1 P. Wms.           |
| (e) Ante, p. 1110; vide etiam, Sin- | 743, ante, p. 1711.                          |
| clair v. James, 1 Dick. 277; Thomp- | (i) Ante, p. 1274.                           |

(1) Proceedings may be had in such case to preserve the property in dispute. *Washington Ins. Co. v. Slee*, 2 Paige, 368; or to set aside irregular proceedings in the Master's office; *Quackenbush v. Leonard*, 10 Paige, 131; or to punish a party for breach of an injunction. *Hawley v. Bennett*, 4 Paige, 163.

(2) *Methodist Epis. Church v. Jaques*, 3 John. Ch. 1.

Effect of  
Abatement.

— where  
defendant is in  
custody upon  
process,

— upon an  
injunction,

— upon a  
receiver.

Upon an in-  
junction.

Where abate-  
ment is partial.

It is to be observed, that an abatement, although it suspends proceedings in a cause, does not put an end to them ; therefore, where process of contempt has been executed, and a defendant is in custody upon it, and afterwards the suit abates, the defendant is not thereby entitled to his discharge out of custody, but he must move that the plaintiff may revive within a limited time, or that the bill may be dismissed and he may be discharged. So, also, an injunction is not absolutely dissolved by an abatement, but the defendant must, if he wishes to get rid of the injunction, move that the plaintiff may revive within a limited time, or that the injunction may be dissolved (k) (1). With respect to motions of this description, Sir Jas. Wigram, V. C., observed (l), " That by the abatement of the suit all orders made in it would naturally drop. When, therefore, the Court (before it will permit an injunction to drop, on the ground of the suit being abated) gives the representatives of a deceased plaintiff notice that the injunction will be dissolved, unless the suit is revived within a limited time, it makes no order against the representatives, but, as matter of indulgence merely, gives them notice that the natural consequences of the abatement of the suit will ensue, unless they take measures to prevent it. And when the Court makes an order in the abated suit that the injunction be dissolved, it decides only that it will no longer prevent the natural consequences of the abatement of the suit."

The same observations seem to apply to receivers appointed under an order of the Court, who are not usually discharged on abatement without an order of the like description.

Where an abatement is partial, *e. g.*, where it is caused by the death of a defendant, it prevents those proceedings only by which the interest of the deceased defendant may be affected ; for the death of a defendant makes an abatement *quoad* himself alone ; therefore, if there be a decree against trustees and their *cestui que trust* to convey, and the *cestui que trust* dies, the trustees may be compelled to convey, notwithstanding his death (1). So also, pending an abatement, by the death of a defendant, process of contempt may be issued and executed against the other defendants ; and, we

(k) *Jones v. Massey*, *Brown v. kew v. Townsend*, 2 Dick. 471, and *Warner*, *Turner v. Cole*, all quoted in post.  
Chowick v. Dimes, 3 Beav. 292. (l) *Lee v. Lee*, 1 Hare, 622.  
This will not apply to injunctions (l) *Finch v. Lord Winchelsea*, 1 made perpetual by decree ; vide *As- Eq. Ca. Ab. 2.*

(1) *Leggett v. Dubois*, 2 Paige, 211 ; *Hawley v. Bennett*, 4 Paige, 163 ; *White v. Fitzhugh*, 1 Hen. & Munf. 1 ; *Kenner v. Hard*, ib. 204 ; *Collier v. Bank of Newbern*, 1 Dev. & Bat. Eq. 328.

have before seen, that during such an abatement, the Court will, at the instance of a creditor, take the prosecution of a decree from the plaintiff (m). Effect of Abatement.

It has also been held, that the death of a defendant, after hearing but before judgment, does not necessarily prevent judgment (n); but where, upon a motion to dismiss for want of prosecution, the plaintiff appears and undertakes to set the cause down for hearing within a limited time, in default of which the bill is to stand dismissed, and afterwards the defendant dies, and the time for setting the cause down expires before the suit can be revived, the order dismissing the bill is suspended during the abatement (o). — upon an order to dismiss,

We have already seen (p) that where a bill against several defendants is retained, with liberty for the plaintiff to bring an action against one of them, the trial may take place during an abatement occasioned by the death of another defendant, provided such other is not directed by the decree to attend the trial, in which case a trial before the suit is revived against such defendant will be irregular. — where a trial at Law has been directed.

Where the abatement of a suit is total, an order to revive places the suit and all the proceedings in it, in precisely the "same plight, state, and condition that the same were in at the time when the abatement took place" (q), and the new plaintiff may take the same proceedings in the cause that the original plaintiff might have done; thus the plaintiff in a revived suit may amend the original bill, and issue an attachment against the defendant for not answering the amended bill (r). So also, the new plaintiff may prosecute process of contempt against the defendant, taking it up where it left off at the abatement; and if a process has been issued before the abatement, it will be revived by the order to revive (s). Effect of revivor.

The case is different where the abatement is occasioned by the death of a defendant; in such case, the process being personal, cannot be revived (t). In general, however, where an abatement is occasioned by the death of a defendant, the order to revive against the representatives of such defendant will place the suit as fully in the same position with regard to such representatives as can be done, with reference to the change of the individuals before the Court. Where abatement caused by death of defendant.

- (m) Ante, p. 1348. bic, 1 Dick. 98.  
 (n) Davies v. Davies, 9 Ves. 461. (s) Hyde v. Forster, 1 Dick. 134.  
 (o) Gregson v. Oswald, 1 Cox, 344. (t) A difference, as to practice, exists between sequestrations upon *mesne* process and sequestrations to enforce the performance of a decree or order, ante, p. 1263.  
 (p) Ante, p. 1705.  
 (q) Gregson v. Oswald, 1 Cox, 343.  
 (r) Lord Red. 78; Philips v. Dar-

## SECTION IV.

*Bills in the Nature of Bills of Revivor.*

Original bills  
in the nature  
of revivor.

A BILL of revivor, properly so called, lies only in cases where a death intervenes, and it is necessary to bring the proper representatives, whether real or personal, of the deceased party, before the Court; or where, by reason of the marriage of a female plaintiff, her rights are so modified that the suit cannot be carried on by herself alone, but her husband becomes a necessary party (u). In each of these cases there is no other fact to be ascertained, than whether the new party brought before the Court, has the character imputed to him. If he has, the revivor is of course: but there are many cases, in which there are other facts which may be brought into litigation, besides the mere question of the character of the new party; and to such cases, therefore, the simple bill of revivor does not technically apply. Under such circumstances, *an original bill in the nature of a bill of revivor*, is the appropriate process to bring these facts before the Court, and to put the original proceeding again in motion, and enable the new party to have the benefit of the former proceedings (z) (1).

In what cases  
they are  
proper.

Thus, if the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the Court of Chancery; as in the case of a devise of a real estate, the suit cannot be continued by a mere bill of revivor. An original bill, upon which the title may be litigated, must be filed; and this bill will have so far the effect of a bill of revivor, that, if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill, as if the suit had been continued by a bill of revivor (y) (1).

The distinction, between bills of revivor and bills in the nature of bills of revivor, seems to be, that the former, in case of death, are founded upon privity of blood or representation by operation of law; the latter in privity of estate, or title by the act of the

(u) Ante, p. 1696-7.

(z) Lord Red. 70, 97; Prac. Reg. 548; S. C.; Prac. Reg. 90; Jones v. 90, 91; Story's Eq. Pl. 249.

(y) Lord Red. 70 and 97; Clare v.

Wordale, 1 Eq. Ca. Ab. 3; 2 Vern. 548; S. C.; Prac. Reg. 90; Jones v. 90, 91; Story's Eq. Pl. 249.

(1) Story Eq. Pl. § 377.

(2) See *Douglass v. Sherwood*, 2 Paige, 358; Story Eq. Pl. § 378.

(j). In the former case, nothing can be in contest, except the party be heir or personal representative; in the latter the nature and operation of the whole act, by which the privity of title is created, is open to controversy (a) (1); thus, for example, the heir may be made a party by a bill of revivor, for it is by mere operation of law; but the devisee must come in by bill in the nature of a bill of revivor; for he comes in as devisee under the testator, in privity of estate or title which is disputed (b).

Original Bills  
in the Nature  
of, &c.

A bill is said to be original, merely for want of that privity between the party to the former bill and the party to the new bill, though claiming the same interest, which would have prevented the continuance of the suit by a bill of revivor; there is no objection to the validity of the alleged transmission of interest in such a case, the party to the new bill will be equally bound by, or take advantage of, the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest (c); and the suit is considered as if it began from the filing of the original bill, so as to save the Statute of Limitations, to have the advantage of compelling the defendant to answer before an answer can be compelled to a cross bill, and to have the advantage, which would have attended the institution of the suit by the original bill, if it could have been continued by a bill of revivor merely (d).

Why said to  
be original.

ac. Reg. 90. Lord Ch. Baron Gilbert, in his *Reasons*, 172, states the reasons:— "This subpoena is only returnable against the executor, administrator, or heir in privity, as they call it, in immediate representation of the party litigant deceased; for a bill of revivor is only returnable against the assignee of any plaintiff who has died, or the assignee of such plaintiff, and for two reasons: first, because it is upon a suit to be a chose in action, which was not assignable at common law; but this has been long since obsolete out of Chancery, where they have assigned such interest: second and better reason is, where the party devises or dies, if the assignee were to bring his

bill of revivor against the defendant, the heir or executor would be precluded, who might have a right to contest such disposition, and therefore he must bring his original bill, and make the heir or executor a party." See ante, p. 1667-8.

(b) Story's Eq. Pl. 251; Coop. Eq. Pl. 63, 69, 77; For. Rom. Ch. 9, p. 172; Prac. Reg. 90; 1 Eq. Ca. Ab. 2, B. Pl. 1; Harrison v. Ridley, 2 Eq. Ca. Ab. 3; Comyn's R. 589, S. C.

(c) Lord Red. 97; Clare v. Wordall, 2 Vern. 548; 1 Eq. Ca. Ab. 83; sub nom. Vare v. Wordall; Mordaunt v. Minshull, 6 Bro. P. C. 32, ed. Toml.; Johnson v. Northey, Prec. in Ch. 134; 2 Vern. 407, S. C.; Houlditch v. Marq. of Donegall, 1 S. & S. 495; [Story Eq. Pl. § 380.]

(d) Lord Red. 97; Child v. Frederick, 1 P. Wms. 266.

This subject is fully and learnedly discussed in *Slack v. Walcott*, 3 M. & C. 406.



Original Bills  
in the Nature  
of, &c.

Difference be-  
tween and  
original bills  
in the nature  
of supplement-  
tal bills.

By whom bills  
in the nature  
of bills of re-  
vivor may be  
brought.

Form of.

It has been remarked, by Lord Redesdale, that there seems to be this difference between *an original bill in the nature of a bill of revivor* and an original bill in the nature of a supplemental bill: upon the first, the benefit of the former proceedings is absolutely obtained; so that the pleadings in the first cause, and the depositions of witnesses, if any have been taken, may be used in the same manner as if filed or taken in the second cause; and if any decree has been made in the first cause, the same decree shall be made in the second: but in the other case a new defence may be made; the pleadings and depositions cannot be used in the same manner as if filed or taken in the same cause; and the decree, if any has been obtained, is no otherwise of advantage than as it may be an inducement to the Court to make a similar decree (e).

A bill in the nature of a bill of revivor cannot be brought, except by some person who claims in privity with the plaintiff in the original bill (1): thus, for example, if a bill is filed by a devisee under a will, and afterwards a subsequent will is proved, by which the same property is devised to another devisee; in such a case, the latter devisee cannot, by a bill in the nature of a supplemental bill, avail himself of the proceedings in the original suit; for there is no privity between the plaintiff in the original suit, and the plaintiff in the supplemental bill; but if the bill had been filed by the deviser himself for some matter touching the estate devised, then the second devisee might file a supplemental bill in the nature of a bill of revivor, notwithstanding the first devisee has already filed such a bill; for he derives his title solely from the deviser, independently of the first devisee (f).

An original bill in the nature of a bill of revivor should generally state the same facts as a bill of revivor; it should state the original bill, the proceedings upon it, the abatement, and the manner in which the interest of the party deceased has been transmitted; it must also charge the validity of the transmission, and state

(e) Lord Red. 72, and vide ante, p. 1686; [Story Eq. Pl. § 384.] Ca. 27; Rylands v. Latouche, 2 Bligh, 585; Tonkin v. Lethbridge, Coop.

(f) Oldham v. Eboral, Coop. Sel. Rep. 43.

(1) Story Eq. Pl. § 385.

Where a bill in the nature of a bill of revivor is filed by any one, who was not a party to the original suit either as the representative of a deceased party or otherwise, all of the other parties to such original suit, who have any interest in the further proceedings therein, should be made parties to such bill, either as plaintiffs or defendants. The Farmers' Loan and Trust Co. v. Seymour, 9 Paige, 538.

the rights which have accrued by it (g). The bill should also pray, that the suit may be revived and the plaintiff have the benefit of the former proceedings therein. Original Bill in the Nature of, &c.

Bills of this description are liable to demurrers or pleas on the same grounds as original bills and bills of revivor, of whose nature they partake; and the practice, as to demurring, pleading, and answering them, is the same, in all respects, as the practice upon original bills. Indeed, in all other respects, the practice upon these bills is the same as upon original bills, and they must be brought on for hearing in the same manner before any benefit can be derived from them; a revivor, in such cases, being only obtained by decree, and not by an order to revive, as in the case of an ordinary bill of revivor. Defence to.

*Supplemental bills in the nature of a bill of revivor*, have been before attended to. The cases where they are applicable are those in which there is an abatement of the suit, but the person by or against whom the suit is to be continued, although claiming under the individual in respect of whom the abatement has occurred, is not the representative whom the law allows to be recognised, but is one whose person or title cannot be litigated in this Court, but may be disputed before another tribunal. Thus where a defendant to a suit becomes bankrupt or insolvent, the suit which has become abated by the bankruptcy or insolvency may, as we have seen, be continued against his assignees by a supplemental bill, which is to this extent in the nature of a bill of revivor (h). So, where the interest of a person suing or sued in *autre droit* is determined by death, as in the case of an assignee or personal representative or the committee of a lunatic, the decease of the party suing or sued causes an abatement of the suit, which, however, cannot be remedied by bill of revivor, but by supplemental bill, which, from its performing the office of a bill of revivor, is designated a supplemental bill in the nature of a bill of revivor. In all these cases, however, the bill, although designated as being in the nature of a bill of revivor, is neither more nor less than a supplemental bill. Supplemental bills in the nature of.

(g) *Ld. Red. 120; Phelps v. Sproule*,  
 4 Sim. 316; [Story Eq. Pl. § 386.] (h) *Ante*, p. 1697-8.

## SECTION V.

*Bills of Revivor and Supplement.*

In what cases  
was proper.

If a suit becomes abated, and, by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement (i), or a devise, under certain circumstances (k), though a bill of revivor merely may continue the suit so as to enable the parties to prosecute it, yet, to bring before the Court the whole matter necessary for its consideration, the parties must, by supplemental bill, added to and made part of the bill of revivor, show the settlement or devise or other act by which their rights are affected; and in the same manner, if any other event which occasions an abatement is accompanied or followed by any matter necessary to be stated to the Court, either to show the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to show by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill, added to the bill of revivor (l).

Supplemental  
matter not  
allowed to cor-  
roborate the  
original  
equity.

Where, however, the original bill had been demurred to, and the demurrer undisposed of, Lord Langdale, M. R., held that where the equity of the original bill was thus challenged, it was not competent for a party claiming in the same right as the original plaintiff, to file a bill of revivor and supplement, claiming the same or additional relief by adding supplemental matter in corroboration of the original claim, and not required for the purpose of showing by and against whom an order to revive may be obtained (m).

Practice upon.

A bill of revivor and supplement is merely a compound of these two species of bills (1), and must be framed and proceeded upon

(i) See *Merrywether v. Mellish*, 13 Ves. 161.

(k) See *Rylands v. Latouche*, Bligh, 566.

(l) See *Russell v. Sharp*, 1 Ves. & B. 500. It is not necessary that the supplemental matter should arise out of or be consequent upon the abate-

ment; any matter which it would be proper to introduce by supplemental bill, may be added to a bill of revivor, and so constitute a bill of revivor and supplement.

(m) *Bampton v. Burchell*, 5 Bea. 330, confirmed upon appeal, 1 Ph. 568.

(1) It not only continues a suit that has abated, but supplies any defect in the original bill arising from subsequent events. *Westcott v. Cady*, John. Ch. 242. Whenever a plaintiff has a right to revive a suit, he may add to the bill of revivor such supplemental matter as is proper to be added. *Fendleton v. Fay*, 3 Paige, 204.

in the same manner (n). They are each liable to the same description of defence as the bills, if separate, would be liable to (1) : and it is to be recollected, that, in all cases where there is a bill of revivor and supplement, the case must be set down for hearing against all the parties, although the bill is only a bill of revivor against one, and an order to revive has been obtained (o).

(n) Lord Red. 80.

(o) *Lake v. Austwick*, 30 Jan. 1840,  
4 Jurist, 314.

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(1) If matters contained in a bill of revivor and supplement are irrelevant or improper, the defendant may take advantage of the objection, either by plea, or by demurrer, or by exceptions for impertinence. *Pendleton v. Fay*, 3 Paige, 204. But the insertion of supplemental matter in a bill of this nature will not authorize the defendant to demur to the whole bill. He should demur to the supplemental matter only. *Randolph v. Dickerson*, 5 Paige, 517. See *Pendleton v. Fay*, 3 Paige, 204, cited ante, 1689, note.

## CHAPTER XXX.

## BILLS OF REVIEW.

When neces-  
sary.

AFTER a decree has been made in a cause, a new original bill cannot be brought between the same parties, and for the same matters, unless the decree has been obtained by fraud (*a*).

If a party seeks to reverse a decree which has been *signed and inrolled*, and upon error apparent, or on new facts, or facts discovered since publication passed in the original cause, he must file a bill of review (1). If the decree has *not* been signed and inrolled, and it is upon error apparent, he is at liberty to present a petition of rehearing. If the decree has not been signed and inrolled, and is sought to be reversed on new facts, or facts discovered since publication passed, the remedy is by a supplemental bill in the nature of a bill of review (2). Each of these remedies will be considered in their order.

Chief Baron Gilbert, in his "Forum Romanum," compares a bill of review to an appeal from the prince pronouncing a definitive sentence of the civil and canon law uninformed, to the prince better informed (*b*).

(*a*) *Wortley v. Birkhead*, 3 Atk. 809; Mit. 84.

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(1) This inrolment of the decree is essential to what is called by way of pre-eminence, a Bill of Review. The inrolment of decrees in England is now little known in practice, and therefore bills of review are rarely brought. See *Cooper Eq. Pl.* 91. But in most of the State Courts of Equity in America, and certainly in the Courts of the United States, all decrees in Equity, as well as judgments at Law, are matters of record, and are deemed to be inrolled, as of the term of the Court at which they are passed, whether they are actually inrolled or not; so that in those Courts a bill of review is the ordinary and appropriate proceeding. *Dexter v. Arnold*, 5 Mason, 303, 310, 311; *Whiting v. Bank of United States*, 13 Peters, 6, 13.

A bill of review lies only to a final decree. *Mackay v. Bell*, 2 Munf. 523; *Ellzey v. Lane*, 2 Hen. & Munf. 589. An interlocutory decree, if erroneous, may be corrected by motion or petition to the Court. *Banks v. Anderson*, 2 Hen. & Munf. 20; *Whiting v. Bank of United States*, 13 Peters, 6, 14; *Story Eq. Pl.* § 634a.

(2) See *Wiser v. Blachly*, 2 John. Ch. 488; *Mead v. Arms*, 3 Vermont, 148; 2 Harr. & John. 230; 4 J. J. Marsh. 500.

devisee is not entitled to a bill of review of a decree against the testator, not being in privity with him; neither can an assignee in any case have a bill of review. Only parties or privies, heirs, executors, or administrators, can ordinarily bring this bill (1). Who may file and when.  
Who may file same.

1. If a decree is made against a person who had no interest at all in the matter in dispute, or had not such an interest as was sufficient to render the decree against him binding upon some person claiming the same or a similar interest, relief may be obtained by a bill of review. Thus, if a decree is made against a tenant for life only, a third person in tail or in fee cannot defeat the proceedings against the tenant for life but by a bill, showing the error in the decree, the incompetency in the tenant for life to sustain the suit, the accrual of his own interest, and thereupon praying that the proceedings in the original cause may be reviewed, and for the purpose that the other party may appear to, and answer this bill, and that the rights of the parties may be properly ascertained. A bill of this nature, as it does not seek to alter a decree made against the plaintiff himself, or against any person under whom he claims, may be filed without the leave of the Court (2).

2. A party cannot bring a bill of review after a demurrer has been entered to a former bill of review (3).

Where it may or may not be brought.

3. Upon a bill of review a decree has been reversed, another bill of review may be brought upon the decree of reversal (4).

4. If a bill of review has been dismissed, another bill brought by the same party, suggesting further error, was dismissed as irregular.

For. Rom. 183.

Wyatt, P. R. 95; Gilb. Form. 441; Dunny v. Filmore, 1 Vern. 135. 186.

Mitf. pl. 83.

(e) Pitt v. Earl Arglass, 1 Vern.

(f) Mitf. pl. 79.

Webb v. Pell, 3 Paige, 368; Kennedy v. Ball, Litt. Sel. Ca. 125.

Even persons having an interest in the cause, if not aggrieved by the legal errors assigned in the decree, cannot maintain a bill of review, or injuriously the decree may affect the rights of third persons. Story, Pl. § 409; Thomas v. Harvie, 10 Wheaton, 146; Whiting v. Bank of the United States, 13 Peters, 6.

With this exception, it may be generally stated, that all the parties to the original bill ought to join in a bill of review. Bank of U. S. v. White, 4 Cr. 253; Dexter v. Arnold, 5 Mason, 308.

Webb v. Pell, 1 Paige, 564; Edwardson v. Maseby, 4 J. J. Marsh. 500; t. v. M'Ilroy, 4 Monroe, 145.

Story Eq. Pl. § 418.

See Story Eq. Pl. § 418; Mitford Eq. Pl. by Jeremy, 88. But see d. v. Bryan, 2 Paige, 45.

Limitation of  
time for bring-  
ing.

Effect of in-  
rolment on.

Time beyond  
which it can-  
not be filed.

lar (*g*). After two trials, and a decree to establish the will, a bill of review was brought upon discovery of new matter; another trial was ordered, and a verdict being found for the heir at law, the former decree was reversed (*h*).

No objection can be taken to a bill of review, that the plaintiff has inrolled the decree; "because," says Lord Nottingham's MSS., "he can have no error till it be inrolled, and perhaps the defendant will never inrol it" (*i*). If a decree has been taken by consent, a bill of review will not lie against it, for *consensus tollit errorem* (*k*) (1).

In *Fitton v. Macclesfield* (*k*), it is said, there is no limitation of time for bringing a bill, but that after long acquiescence the Court will not reverse a decree, except upon very apparent errors; and the Court refused to reverse a decree made twenty-two years before the bill of review. It appears, however, that the limitation is twenty years; and that, after twenty years, a bill of review cannot be brought (2). The twenty years are computed from the date of the decree, and not from the time of the inrolment (*l*) (3). Though a bill of review cannot in general be brought to reverse a decree after twenty years, yet that does not apply to persons having contingent interests, or not existing, or being under disabilities (*m*).

If the decree has been signed and inrolled, so that the cause

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|------------------------------------------------------|-------------------------------------------------------------------------------------|
| ( <i>g</i> ) Wyatt, P. R. 97.                        | ( <i>k</i> ) Webb v. Webb, 3 Swanst. 658.                                           |
| ( <i>h</i> ) Attorney-general v. Turner, 2 Amb. 587. | ( <i>k</i> ) 1 Vern. 237.                                                           |
| ( <i>i</i> ) Cook v. Bamfield, 3 Swanst. 607.        | ( <i>l</i> ) Deloraine v. Brown, 3 Bro. C. C. 640, 621, ( <i>n</i> ); Mitf. pl. 79. |
|                                                      | ( <i>m</i> ) Wyatt, P. R. 98.                                                       |

(1) See *Lansing v. Albany Ins. Co.* 1 Hopk. 102; ante, 1602, note, as to decrees by consent. A bill of review will not lie where the plaintiff himself has dismissed his bill. *Jones v. Zollicoffer*, 1 Car. Law Repos. 376.

(2) In the Courts of the United States, bills of review for errors apparent on the face of decrees, are limited to five years, that being the limitation of writs of error upon judgments at law. *Thomas v. Harvie*, 10 Wheaton, 146; *Story Eq. Pl.* § 410.

In New York, the bill must be brought within the time limited for an appeal. Rule 173 in Chancery.

It is not necessary to plead that the bill is not filed within the proper time. It ought to appear on the face of the bill that it is so, or that the plaintiff is within the saving of the statute. *Sheppard v. Lane*, 6 Munf. 529; *Story Eq. Pl.* § 635, and note.

See *Bucknor v. Forker*, 7 Dana, 51, where it was held that a bill of review will not be sustained for error of law, after a lapse of time which would bar a writ of error, unless the delay is sufficiently accounted for.

The question may arise whether a like limitation applies to bills of review upon newly-discovered facts and evidence. See as to this, *Story Eq. Pl.* § 419; *Benson v. Cutter*, 5 J. J. Marsh. 610.

(3) *Scarisbrick v. Lord Skelmersdale*, 4 Younge & Coll. 79, 106.





On what  
grounds  
brought and  
how bill drawn

what is error  
apparent;

how this bill  
drawn;

matters of law, appearing on the body of the decree, or because the Court wanted or exceeded its jurisdiction (2) (r). Some judges use the term, "appearing or arising on the body of the decree;" others, "apparent on the face of the decree;" both expressions must be understood in a circumscribed signification. Lord Eldon, in *Perry v. Phelps* (r), observes, "There is a distinction between error in the decree, and error apparent; error apparent does not apply to a merely erroneous judgment." And again he says, "The question is not whether the cause is well decided, but whether the decree is right or wrong on the face of it;" and adds, "the cases of errors apparent are of this sort — an infant not having a day to show cause."

The bill of review is drawn, settled and signed, by counsel. In a bill of review it is necessary to state the former bill and the proceedings thereon; the decree, and the point in which the party exhibiting the bill of review conceives himself aggrieved by it; and the ground of law, or new matter discovered, upon which he

(r) *Fitton v. Macclesfield*, 1 Vern. 292.

(r) 17 Ves. 178.

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crec. *Lansing v. Albany Ins. Co.* 1 Hopk. 102. Nor after a demurrer has been allowed to a former bill of review. *Respass v. McChanahan*, Hardin, 342.

The error must appear on the decree and pleadings; for the evidence in the case at large cannot be examined to ascertain whether the Court misstated or misunderstood the fact. *Dexter v. Arnold*, 5 Mason, 303; Story Eq. Pl. § 407. But taking the facts as they are stated to be on the face of the decree, it must be shown that the Court have erred in point of law. Story Eq. Pl. § 407. If therefore the decree does not contain a statement of the material facts on which the decree proceeds, it is plain that there can be no relief by a bill of review, but only by appeal to some superior tribunal. Story Eq. Pl. § 407. It is on this account that in England decrees are usually drawn up with a special statement of, or reference to, the material grounds of fact which support the decree. In the Courts of the United States, the decrees are usually general, without any statement of facts. See ante, ch. 24, § 2, p. 1210, et seq. and notes; *Burdine v. Shelton*, 10 Yerger, 41. But for the purpose of examining all errors of law, the bill, answer, and other proceedings, are in our practice as much a part of the record before the Court as the decree itself; for it is only by a comparison with the former, that the correctness of the latter can be ascertained. Story Eq. Pl. § 407; *Dexter v. Arnold*, 5 Mason, 311, 312; *Hollingsworth v. M'Donald*, 2 Har. & John. 230; *Webb v. Pell*, 3 Paige, 368; *Whiting v. Bank of U. States*, 13 Peters, 6, 13, 14; *Ludlow v. Kidd*, 2 Ohio, 372.

A bill of review for error of law may be brought wherever the decree is contrary to the statute law. *Cooper* Eq. Pl. 89; *Wyatt's Prac. Reg.* 225.

Error in matter of form only, though apparent on the face of a decree, seems not to have been considered a sufficient ground for reversing a decree. And matter of abatement has been also treated as not capable of being shown for error to reverse a decree. Story Eq. Pl. § 411; *Mitford* Eq. Pl. by Jeremy, 85.

In case of miscasting and miscounting, where the matter demonstratively appears from the decree itself to be mistaken, it may be explained and reconciled by order. *Seton on Decrees*, 399, and cases cited.

to impeach; and if the decree is impeached on the latter  
 l, it seems necessary to state in the bill the leave obtained to  
 and the fact of the discovery; though it may be doubted  
 r, after leave given to file the bill, that fact is traversable.  
 ill may pray, simply, that the decree may be reviewed, and  
 d (s) in the point complained of, if it has not been carried  
 ecution. If it has been carried into execution, the bill  
 so pray the farther decree of the Court to put the party  
 aining of the former decree into the situation in which he  
 have been if that decree had not been executed. If the  
 brought to review the reversal of a former decree it may  
 hat the original decree may stand (1). The bill may also,  
 original suit has become abated, be at the same time a bill  
 rivor. A supplemental bill may likewise be added, if any  
 has happened which requires it; and particularly if any  
 not a party to the original suit becomes interested in the  
 t, he must be made a party to the bill of review by way of  
 ment (t) (2). If an order has been obtained dispensing  
 the payment of costs ordered by the decree, it should be set  
 the bill of review (u). The plaintiff cannot put his case  
 alternative as a bill of review, or if the Court shall think it  
 , then as a bill of revivor and supplement (v).  
 : bill is filed by the plaintiff's clerk in Court in the usual  
 r, and the defendant is served with a subpoena and appears  
 an original bill. A bill of review brought to reverse a  
 for error apparent on the face thereof, may be filed without  
 ave of the Court (3) (w). Before a bill of review can be

Form of and  
 what may be  
 embraced.

Prayer of.

How filed.

*Perry v. Phelps*, 17 Ves. 176. (v) *Perry v. Phelps*, 17 Ves. 177.  
*Mitt. Pl.* 80; and see *Perry v.* (w) *Anon.* 2 P. W. 283; *Perry v.*  
 17 Ves. 176; *Price v. Keyte*, *Phelps*, 17 Ves. 178; *Gould v. Tan-*  
 136. cred, 2 Atk. 534.  
*Wyatt*, P. R. 97.

*Story Eq. Pl.* § 420; *Dexter v. Arnold*, 5 Mason, 308, 309; *Mitford*  
 by *Jeremy*, 88-90.

*Story Eq. Pl.* § 420; *Mitford Eq. Pl.* by *Jeremy*, 88-90; *Hodson v.*  
 1 *Simmons*, 456, 463.

ll of review defective in frame may sometimes be sustained as a cross  
*Welf. Pl.* 239; *Cooper Eq. Pl.* 95; *Mitford Eq. Pl.* by *Jeremy*, 89, 90.  
 By Rule 173, New York in Chancery, no bill of review can be filed,  
 upon the discovery of new matters, or otherwise, without special  
 of the Court first obtained. The application for this purpose should  
 le by petition; which should state the nature of the suit, the decree,  
 e errors of law, or the new matters, as the case may be, upon which  
 plication is founded, and should pray for liberty to file a bill of review,  
 g such decree into review. If the application is founded upon the  
 ary of new matter, the petition must describe the new evidence dis-  
 and specifically, and state when it was discovered, and its bearing

Mode of Proceeding.

How proceeded with, deposit;

Effect of in execution of decree;

To entitle a party to file this bill he should have obeyed the decree;

filed it is necessary that a deposit of 50*l.* should be made to answer costs (*x*). The deposit is made with the senior registrar. By the 5th of Lord Bacon's Ordinances, it was provided that no bill of review should be put in except the party that preferred it entered into recognizances with sureties for satisfying costs and damages for the delay if it was found against him (*y*). This provision being insufficient, by an Order of 12th March, 1700, it was ordered that for the future no bill of review should be allowed or admitted except the party who preferred it first deposited the sum of 50*l.* with the registrar of this Court, as a pledge to answer such costs and damages as this Court should award to the adverse party, in case the Court should think fit to dismiss the said bill of review (*z*) (1). Filing the bill of review does not prevent the execution of the decree impeached (*a*).

To entitle a person to bring a bill of review it is necessary that he should have obeyed and performed the decree (2); as, if it be for land, that the possession be yielded; if it be for money, that the money be paid; if it be for evidences, that the evidences be brought in; and so in other cases which stand upon the strength of the decree alone. But if any act be decreed to be done which extinguisheth the party's right at the common law, as making of assurance or release, acknowledging satisfaction, cancelling of

(*x*) Anon. 2 P. W. 283.

(*y*) Beam. Ord. 4.

(*z*) Beam. 313.

(*a*) *Williams v. Mellish*, 1 Vern. 117, n.

on the decree. *Dexter v. Arnold*, 5 Mason, 303. It is not sufficient to state that the petitioner expects to prove certain facts. He must state the exact evidence to establish them. On the hearing of such a petition, affidavits may be admitted on both sides, if necessary, to explain the nature of the evidence. *Dexter v. Arnold*, 5 Mason, 303, 308, 309; *Story Eq. Pl.* (3rd ed.) 420, note; *Hollingsworth v. McDonald*, 2 Harr. & John. 230.

Upon an application of this kind, the Chancellor exercises his judgment as to the propriety of interfering or meddling with the decree for the cause disclosed, and grants or refuses leave to file a bill of review accordingly. *Hollingsworth v. McDonald*, 2 Harr. & John. 230.

The Court may refuse it to the party applying, and grant it for the protection of the interests of others. *Hodges v. Milliken*, 1 Bland, 511.

If a bill of review is filed without leave, in a case requiring it, it may be dismissed on motion. *Carroll v. Parran*, 1 Bland, 125.

(1) See Rule 173, New York in Chancery; *Webb v. Pell*, 1 Paige, 564.

(2) *Wiser v. Blachly*, 2 John. Ch. 488; *Livingston v. Hubbs*, 3 *ibid.* 124. Therefore, if the decree be for the payment of money, the party must pay it or give security, although it should afterwards be ordered to be refunded. *Lubé Eq. Pl.* 139. But the rule may be dispensed with under the circumstances of the case. Thus where the party is in execution for non-payment of money under the decree, this is considered equivalent to performance. *Livingston v. Hubbs*, 3 John. Ch. 124. So where the party is insolvent. *Stalling v. Goodloe*, 3 Murph. 159; or has given security for the performance of the decree. *Stalling v. Goodloe*, 3 Murph. 159; *Taylor v. Pearson*, 2 Hawks, 298.

... the party, it is no objection to the bill of review. In *Partridge v. Me (b)*, the decree directed the defendant to pay a certain sum in the execution of the conveyance. The defendant filed a bill of review, which the plaintiff moved to take off the file on the ground that the defendant had not performed the decree. Lord Chancellor refused the motion, the defendant not bound to pay the money until the conveyance was executed. It is estimated, however, that when that was done, if the decree had been obeyed, a motion should be made to stay the proceedings on the bill of review till the decree had been performed.

If the party is unable to perform the decree, he must move for an order to stay what is proper to be stayed (*c*), and should swear to his inability, and if he is in contempt he should surrender himself to the Fleet, to lie there till the matter on the bill of review is determined (*d*). If costs have been decreed in the original cause, they should be paid before the bill of review is filed. In *v. Macclesfield (d)*, a plaintiff was allowed to bring a bill of review without paying the costs decreed in the original cause upon making oath that he was not worth 40*l.* besides the costs in question.

In *Partridge v. Usborne (c)*, a motion was made on behalf of the defendant, that he might be at liberty, under an Order of the 8th August, to file a supplemental bill, in the nature of a bill of review, without previously performing an order made in the original cause on the 22d of January, and that all proceedings under the last mentioned order might be stayed, he undertakes to file such bill within one month, and offering to pay into the Court to the credit of the cause, such sum as the Court might

To reverse a  
Decree on new  
Facts.



How defend-  
ant's appear-  
ance enforced ;  
how bill de-  
fended ;

How suit pros-  
ecuted and de-  
cree varied.

Bill to reverse  
decree on new  
facts.

had not performed the decree." The Lord Chancellor, after reviewing several cases referred to in his judgment, decided that it was only under very particular and special circumstances that the rule requiring the decree to be performed in the original suit could be dispensed with, and that the large amount of the sum to be paid in this case would not justify the Court in interposing for the purpose of dispensing with this order, and refused the motion, with costs.

The appearance of the defendant to a bill of review is enforced in the same manner as to an original bill. The usual defence to this description of bill is by a demurrer. The defendant may plead the decree, and demur against opening the inrolment to a bill of review brought for errors apparent ; and in the plea and demurrer the Court will judge whether there are grounds for opening the inrolment. Mitford says, there seems, however, no necessity for pleading the decree, because it must be stated in the bill, and that the books of practice contain the forms of a demurrer only to such a bill (e) (1). Where any matter beyond the decree is to be offered against opening the inrolment, as length of time, that matter must be pleaded ; otherwise the plaintiff will not have the benefit of exceptions, as infancy, coverture, or the like (2).

If a demurrer be put in to a bill to reverse a decree on error apparent, and the demurrer is overruled, the decree is reversed and the errors allowed, and no further answer or hearing is necessary (f). If the demurrer is allowed, it has all the effect of confirming the decree, and terminates the suit.

The rule upon a strict and proper bill of review is, that the decree can be varied only upon such errors as are complained of, whether errors on the face, or errors of injustice, unless any consequential matter arises ; for if there is a consequential direction, the justice of which depends entirely upon the variation made, the Court may vary a decree as to that consequential direction in favor of justice ; and that is the practice in the House of Lords, who will vary a decree in favor of the respondent in any matter consequential to the relief they give to the appellant (g).

If a bill of review be brought to reverse a decree upon new facts, or facts newly discovered, as upon a deed discovered by the plaintiff since the former decree : or where the plaintiff swore that

(e) Mitf. pl. 166.

607 ; Lord Nottingham's MSS.

(f) Cooke v. Bamfield, 3 Swanst.

(g) Moore v. M'Jorc, 2 Ves. 538.

(1) See Webb v. Pell, 3 Paige, 363 ; Mitford Eq. Pl. by Jeremy, 203, 204. For the form of a demurrer to a bill of review, see Willis, 483 : 2 Equity Drafts, 92 (2nd ed.).

(2) See Mitford Eq. Pl. by Jeremy, 291.

he did not know that certain securities were joint property (*h*); or upon a release or a receipt discovered since publication (*i*), leave must be obtained of the Court to file such bill (*j*) (1).

To reverse Decree on n Facts.

In *Willan v. Willan* (*k*), Lord Eldon, on a petition for liberty to review on new evidence, although the point was not decided, appeared doubtful as to the propriety of a bill of review pending an appeal to the House of Lords against a decree of the Lord Chancellor, affirmed by him on a rehearing. Mitford says a bill of review upon new matter discovered has been permitted, even after an affirmance of the decree in parliament; but adds, that it may be doubted whether a bill of review upon error in the decree itself can be brought after affirmance in parliament (*k*) (2).

Requires leave of Court

When it may be brought.

The application is made by an attendable petition, praying for liberty to file a bill of review. The petition is supported by an affidavit showing the party's rights; that the matter was not known to him at the time of the decree, or was discovered since such other time, that he could not have used it to his advantage in the former cause (*l*) (3).

Petition for leave to file and affidavit in support.

The new matter upon which such a bill is necessary, must have come materially and substantially to the knowledge of the party, or his agents, after the decree, or at least after the time when it could have been advantageously introduced in the former cause (*m*) (4). And the new matter not only must not have come to

The matter must not only be new but material.

(*A*) *Young v. Keighly*, 16 Ves. 350. (*l*) *Wortley v. Birkhead*, 2 Ves. 571.

(*i*) *Taylor v. Sharpe*, 3 P. W. 371. (*m*) *Ord. v. Noel*, 6 Madd. 127;

(*j*) *Anon.* 2 P. W. 283; *Perry v. Willan v. Willan*, 16 Ves. 87; *Earl of Portsmouth v. Lord Effingham*, 1 Ves. 434; *Norris v. Le Neve*, 3 Atk. 34.

(*k*) 16 Ves. 87.

(*k*) Mitf. pl. 79.

(1) See ante, 1729, note 3; *Webb v. Pell*, 1 Paige, 564; *Edwardson v. Maseby*, 4 J. J. Marsh. 500; *Wilkinson v. Parish*, 3 Paige, 653; *Story Eq. Pl. § 412*; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110. The granting of such a bill of review for newly-discovered evidence is not a matter of right, but it rests in the sound discretion of the Court. It may therefore be refused, although the facts, if admitted, would change the decree, where the Court, looking to all the circumstances, shall deem it productive of mischief to innocent parties, or for any other cause unadvisable. *Story Eq. Pl. § 417*; *Dexter v. Arnold*, 5 Mason, 315; *Thomas v. Harvie*, 10 Wheat. 146; *Wood v. Mann*, 2 Sumner, 316; *Hollingsworth v. McDonald*, 2 Harr. & John. 230.

(2) *Mitford Eq. Pl. by Jeremy*, 88; *Cooper Eq. Pl.* 91; *Story Eq. Pl. § 418*. But see *Stafford v. Bryan*, 2 Paige, 45; *Campbell v. Price*, 3 Munf. 227.

(3) See ante, 1729, note (3).

(4) *Story Eq. Pl. § 413*; *Dexter v. Arnold*, 5 Mason, 303; *Haskell v. Raoul*, 1 M'Cord Ch. 29; *Hollingsworth v. McDonald*, 2 Harr. & John. 230; *M'Cracken v. Finley*, 1 Bibb, 455; *Harvey v. Murrell*, *Harper Eq.*

To reverse a  
Decree on new  
Facts.

What the new  
matter must  
prove.

the knowledge of the party, but it must be shown that the party could not with reasonable diligence have acquired a knowledge of it before the time when publication passed (*o*) (1). Lord Eldon said the question always is, not what the plaintiff knew, but what, using reasonable diligence, he might have known (*p*). The matter must not only be new, but material, and such as if unanswered in point of fact would clearly entitle the plaintiff to a decree, or would raise a question of so much nicety and difficulty, as to be a fit subject of judgment in the cause (2) (*q*). And it is said that the matter if known to the other party must be of such a nature that he was not in conscience obliged to have discovered it to the Court, for if the matter was known to the other party, and such as in conscience he ought to have discovered, he obtains a decree by fraud, and it ought to be set aside by original bill (*r*). The party must show that the new matter is relevant (or that there is probable cause that it may be relevant) to the matters in question (*s*).

In *Willan v. Willan* (*s*), the cause was heard before the Lord Chancellor, and the decree affirmed on rehearing; the defendant appealed to the House of Lords, and pending the appeal, he presented a petition for liberty to file a bill of review. The object was to introduce new evidence in opposition to that of a witness in the original cause, who had given evidence as to a conversation; the ground was, that the evidence was admitted by

- (*o*) *Young v. Keighly*, 16 Ves. 350. (*s*) *Bennett v. Lee*, 2 Atk. 528;  
 (*p*) *Young v. Keighly*, 16 Ves. 353. *Norris v. Le Neve*, 3 Atk. 34; *Earl*  
 (*q*) *Ord v. Noel*, 6 Madd. 127. *of Portsmouth v. Lord Effingham*, 1  
 (*r*) *Manaton v. Molesworth*, 1 Ves. 434.  
 Eden, 25. (*s*) 16 Ves. 87.

257; *Lansing v. Albany Ins. Co.* 1 Hopk. 102; *Dias v. Merle*, 4 Paige, 259; *M'Call v. Graham*, 1 Hen. & Munf. 13; *Pendleton v. Fay*, 3 Paige, 204.

It must at least have been discovered since publication. *Livingston v. Hubbs*, 3 John. Ch. 124; *M'Cracken v. Finley*, 1 Bibb, 455; 4 Hayw. 36; 2 Munf. 305; *Dexter v. Arnold*, 5 Mason, 312; *Wiser v. Blachly*, 2 John. Ch. 488; *Story Eq. Pl. § 413*; *Hodges v. Milliken*, 1 Bland, 511.

It is now the established exposition of Lord Bacon's Ordinance on this point, that the new matter shall not have been discovered until after publication has passed. *Story Eq. Pl. § 413*; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110; *Caller v. Shields*, 2 Stew. & Port. 417.

(1) *Story Eq. Pl. § 414*; *Dexter v. Arnold*, 5 Mason, 312, 320, 321; *Livingston v. Hubbs*, 3 John. Ch. 124; *Pendleton v. Fay*, 3 Paige, 204; *Wiser v. Blachly*, 2 John. Ch. 488; *Barrow v. Rhinelanders*, 3 John. Ch. 120; *Lansing v. Albany Ins. Co.* 1 Hopk. 102; *Love v. Blewit*, 1 Dev. & Bat. Eq. 108, 110.

(2) *Story Eq. Pl. § 413*; *Blake v. Foster*, 2 Moseley, 257; *Wiser v. Blachly*, 2 John. Ch. 488; *Livingston v. Hubbs*, 3 John. Ch. 124; *Kennedy v. Ball*, 6 Litt. 125.

it being in answer to an interrogatory, and not the subject in issue. The Lord Chancellor did not think the bill out, or that the new evidence could be received; and the decree was not founded on the evidence complained of; the bill was refused with costs (1).

To reverse a  
Decree on new  
Facts.

As to allowing bills of review to be filed upon facts discovered, Lord Eldon said, the decisions appear to have been made on new evidence, which, if produced in time, would have been the original case, and are not applicable where the case does not admit the introduction of the evidence as set out in issue originally, especially where enough appears in the original pleadings to call upon the plaintiff, using diligence, to bring forward the whole case (t). And a bill for liberty to review was refused, although Lord Eldon said in substance the petition might have succeeded.

*Person v. Slaughter* (t), Lord Hardwicke says:— "All bills of review that I recollect to have known were of the nature of bills to prove what was put in issue. Lord Effingham's case; he claimed under an old entail; and though he made title under a different entail, yet the issue was as to the land under some old entail generally. In the present case it is a bill to prove what was put in issue, but to prove a matter not in issue, and therefore the defendant would not assent to a bill of review" (u). Chief Baron Gilbert, in his dissenting opinion, says, "They can examine to nothing that was the original cause, unless it be any matter happening after the judgment, which was not before in issue, or upon matter of fact or writing not known before; for if the Court should leave to enter into proofs upon the same points that were in issue, that would be under mischief, as the examination would be after the same publication, and an inlet into manifest error."

It underwent a careful examination in a recent case, of *Need not be confined to points in issue in original cause.* *v. Osborne*, (v). A bill was filed in this suit, for the performance of an agreement to purchase: a reference was directed: a good title found: and a specific decree decreed. After this it was discovered that there had been a misrepresentation as to the timber, which formed a

*v. Keighly*, 16 Ves. 354. 228.

1893.

*1893. v. Usborne*, 5 Russ. (v) *Gilb. For. Rom.* 186.

(v) 5 Russ. 195.

—discovered evidence, which goes to impeach the testimony of the plaintiff, is not sufficient. *Livingston v. Hubbs*, 3 John. Ch. 124.



To reverse a  
Decree on new  
Facts.

prominent part of the purchase; and, on that ground, an application was made for liberty to file a bill of review. To this petition it was objected, that the point as to the timber not being raised by the answer, and not being in issue in the cause, the application could not be granted. In answer to this objection, a case of *Barnes v. Offer* (*w*), decided by the Master of the Rolls, 20th December, 1825, was cited, showing that a point not in issue formed the ground for granting liberty to file a supplemental bill, in the nature of a bill of review. The Lord Chancellor said: "As to the question whether the matter brought forward by this petition, not having been put in issue in the original cause, it is now competent for the petitioner to ask for the benefit of it, by means of a supplemental bill in the nature of a bill of review, I am satisfied, by the discussion which has taken place, that, in a suit of this description, a party may apply for such relief as this petition prays" (1). The order made by his lordship was, that the petitioner, upon depositing 50*l.* with the registrar, should be at liberty to file a supplemental bill in the nature of a bill of review, upon the new matter stated in his petition touching the warranty and otherwise, and for relief, as he should be advised; and that he should be at liberty to apply to have the original cause set down to be reheard, and to come on at the same time.

Within what  
time the evi-  
dence must  
have come to  
knowledge of  
plaintiff.

If the matter had come to the knowledge of the plaintiff's attorney, before the time had expired within which such evidence could have been used in the original cause, it is notice to the party himself (*x*), and will not form a ground for a review.

In a case where a party, after decree, came to the knowledge of two letters, which seemed to overthrow the decree and all the proceedings dependent thereon, the Court below would not put the party to answer to those two letters, but allowed a demurrer to a bill of review. The reason given in that case was, that the party

(*w*) *Partridge v. Usborne*, 5 Russ. (z) *Norris v. Le Neve*, 3 Atk. 35. 225, n.

(1) Story Eq. Pl. § 415, 416 and notes; Mitford Eq. Pl. by Jeremy, 85-87; *Dexter v. Arnold*, 5 Mason, 313.

It seems now to be established, that matter discovered after a decree has been made, though not capable of being used as evidence of any thing which was previously in issue in the cause, but constituting an entirely new issue, may be the subject of a bill of review, or of a supplemental bill in the nature of a bill of review. Welf. Eq. Pl. 238; Story Eq. Pl. § 416.

In *Love v. Blewit*, 1 Dev. & Bat. Eq. 103, 110, it was held, that if the newly-discovered evidence is in writing or of record, a review will be granted, notwithstanding the fact to which such evidence relates may have been in issue before; but otherwise, if the newly-discovered evidence is merely parol proof. *Head v. Head*, 3 A. K. Marsh. 121. See Story Eq. Pl. § 415 and note, § 416; *Randolph v. Randolph*, 1 Hen. & Munf. 180.

might have found out the two letters before the hearing, since he had them in his own custody; and that if this practice should take place, it might overthrow all the decrees in the Court; and that, if this should be allowed as a precedent, a man might take up his defence when he pleased; whereas his whole defence ought to be made at once, and before the hearing. Gilbert adds: "It is said the Lords reversed the allowance of the demurrer, and ordered the party to answer to the bill of review: but this precedent may be found out whenever there is occasion for it." He continues: "Certainly the reversal in the House of Lords was right; for the letters relating to the partnership were found after the decree, which the party had no knowledge of, though they happened to be in his custody; they ought to be taken under consideration, even after a decree signed and inrolled: but then the party in whose custody the papers were, must give an account of their manner of coming to light; and in this case these letters were sent in trunks from Hamburgh, where he had no reason to suspect there were any papers relating to the cause; so the finding of them was as much casual after the decree, as if they had not been in the party's custody, and any matter casually coming to light after a decree that would make an alteration in the decree, ought to be taken into consideration upon a bill of review; and, therefore, they reversed that part of the decree which established the demurrer to the bill of review, without compelling the defendant to such bill of review to answer to the letters" (y).

To reverse  
Decree on new  
Facts.

In *Gould v. Tancred* (z), the petition for leave to review was, 1st, because the Master in his report had not made annual rests; 2dly, had omitted three years in the account; and 3rdly, that there was matter come to the plaintiff's knowledge subsequent to the Master's making his report, though it existed at that time. Lord Hardwicke thought the application unfortunate, the report having been confirmed six years, and refused the petition, as it would appear, on the two first points, because the petitioner's solicitor attended on the accounts before the Master, which bound the party. On the third point the application was refused, as not supported by the evidence.

If the plaintiff, by his petition and the evidence in support, makes out a sufficiently *prima facie* case, an order will be made upon the petitioner his depositing 50*l.* with the registrar, that he may be at liberty to file a bill of review, as he shall be advised. The bill is settled and signed by counsel, and filed with the plaintiff's clerk in

Order made on  
petition, and  
what deposit  
ordered.

(y) For. Rom. 187.

(z) 2 Atk. 553.

Mode of Proceeding and Defence.

Defence to.

court. The defendant is served with a subpœna, appears, and may plead, answer, or demur, as in an original bill.

A bill of review upon the discovery of new matter, and a supplemental bill of the same nature being exhibited only by leave of the Court, the ground of the bill is generally well considered before it is brought; and, therefore, in point of substance, it can rarely be liable to a demurrer. But if brought upon new matter, and the defendant should think the matter not relevant, probably he might take advantage of it by way of demurrer, although the relevancy ought to be considered at the time leave is given to bring the bill (z) (1).

If a demurrer be put in to a bill of review, on the ground of new facts, or facts newly discovered, and the demurrer is overruled, it does not dispose of the cause, and the defendant must answer, because fact is at issue (a) (2). On arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after the demurrer is overruled, the plaintiffs are at liberty to read bill or answer, or any other evidence, as at a rehearing, the cause being now equally open (b) (3). If the demurrer is allowed there is an end of the suit, as no new bill of review can be filed after a demurrer has been allowed to a former bill of review. If the demurrer is allowed it may be inrolled, but it is said to be otherwise if the demurrer is disallowed (c).

If the decree has not been signed and inrolled, and the error is apparent on the face of the decree, the remedy is by a rehearing. There is no instance of a bill *in the nature of a bill* of review upon error apparent (d). If the decree has been inrolled, as before stated, it is a bill of review.

(z) Mitf. pl. 167.

(a) Cooke v. Bampfield, 3 Swanst. 607, Lord Nottingham's MSS.

(b) Catterall v. Purchase, 1 Atk.

290.

(c) Woots v. Tucker, 2 Vern. 119, *sed query?*

(d) Perry v. Phelps, 17 Ves. 178.

(1) 1 Story Eq. Pl. § 636; Mitford Eq. Pl. by Jeremy, 205; Cooper Eq. Pl. 216.

(2) Upon a bill of review for newly-discovered evidence, the other party may controvert the fact that it is newly discovered, by plea or answer. Dexter v. Arnold, 5 Mason, 303. See Hughes v. Milliken, 1 Bland, 506.

(3) Lubé Eq. Pl. 248. If the bill has assigned errors of law, and the plea and demurrer be allowed, an order to that effect is made, and that the bill be dismissed. Webb v. Pell, 3 Paige, 368.

If a bill of review be brought on new matter, fitting to be answered, the defendant may put in an answer controverting the fact that the matter is newly discovered. Lubé Eq. Pl. 132; Dexter v. Arnold, 5 Mason, 303. The case will proceed upon such bill as an original bill. 2 Hoff. Ch. Pr. 12.

If the objection is upon matter of law, apparent, or a mistake in law, to be collected from all the pleadings and evidence, and the decree has not been signed and inrolled, it is the subject of a rehearing, and there is no occasion for a bill, in the nature of a bill of review (*e*) (1).

Supplemental Bills in the nature, &c.

Remedy where decree not signed and inrolled, and the error is apparent.

If new facts have been discovered since publication passed in the original cause, then a supplemental bill is necessary to introduce those facts (*f*). Before this supplemental bill can be filed, the leave of the Court must be obtained in the manner before explained.

When the decree has not been signed and inrolled, you cannot bring a bill of review (*g*).

If the decree has not been signed and inrolled, and the supposed error appears from new matter which has arisen since the decree, or upon new proof materially pressing upon the decree, and discovered after the decree, or at least after publication had passed in the cause, the remedy is by a supplemental bill in the nature of a bill of review (*h*) (2). In this case, leave must be obtained for liberty to file a supplemental bill in the nature of a bill of review, by an attendable petition, supported by affidavit, similar to that used for liberty to file a bill to review a decree signed and inrolled, on new facts or new evidence discovered (3).

Where not apparent but on new matter.

There is this difference between a bill of review and a supplemental bill in the nature of a bill of review. In the former, if introducing also matter of supplement or revivor, the prayer, as far as it is a bill of review, is that the decree may be reviewed and reversed; in the other, adopting also the proper prayer for revivor;

(*e*) Ibid.

178.

(*f*) Ibid.

(*h*) Young v. Keighly 16 Ves. 350;

(*g*) Llewellyn v. Mackworth, 2 Atk. 40; Standish v. Radley, 2 Atk. 409.

(1) Story Eq. Pl. § 421, and note; Pendleton v. Fay, 3 Paige, 204; Wiser v. Blachly, 2 John. Ch. 488; Mitford Eq. Pl. by Jeremy, 90.

(2) Story Eq. Pl. § 422; Pendleton v. Fay, 3 Paige, 204; Mitford Eq. Pl. by Jeremy, 91.

(3) Story Eq. Pl. § 423; Pendleton v. Fay, 3 Paige, 204; Mitford Eq. Pl. by Jeremy, 91.

It seems to be a general rule, that a supplemental bill for newly-discovered matter should be filed as soon after the new matter is discovered, as it reasonably may be. Story Eq. Pl. § 423. If, therefore, a party proceeds to a decree after the discovery of the facts upon which the new claim is founded, he will not be permitted afterwards to file a supplemental bill in the nature of a bill of review founded on those facts; for it was his own laches not to have brought them forward at an earlier stage of the cause. Pendleton v. Fay, 3 Paige, 204; Dias v. Merle, 4 Paige, 259; Story Eq. Pl. § 423.

Supplemental  
Bills in the na-  
ture, &c.



Proceedings  
on.

as to the supplemental matter, you pray that the cause may be re-heard (1).

If the Court is of opinion that the new matter is material and relevant, and of such a nature as to make it a fit subject of judgment in a cause, and the evidence satisfactorily makes out that the new matter did not come to the knowledge of the plaintiff or his agents within such time as the same could have been advantageously used in the original cause, liberty will be given to the petitioner to file a supplemental bill in the nature of a bill of review.

The order is, that upon the petitioner his depositing 50*l.* with the registrar, he may be at liberty to file a supplemental bill, in the nature of a bill of review, as he shall be advised. The deposit of 50*l.* is required, by Order of 17th October, 1741 (i). Before this order, although a bill of review could not be brought upon a decree signed and inrolled, for new and supplemental matter in being at the time of making the decree, but discovered and come to knowledge afterwards, without the leave of the Court, and making a deposit of 50*l.*; yet if the decree had not been signed and inrolled, a practice appears to have existed of filing a supplemental bill in the nature of a bill of review at large, without making any deposit, and without obtaining the leave of the Court at all; and the party then brought a petition to rehear or repeal. This, says Lord Hardwicke, in the cases cited, was growing into abuse, and several supplemental bills were brought for vexation. To put these improper bills of review under the like restraint as the other bills of review, the order of 1741 was made (j).

This order provides, "That no supplemental bill, or bill in the nature of a bill of review, grounded upon new matter discovered, or pretended to be discovered, since the pronouncing of any decree of this Court, in order to the reversing or varying of such decree, shall be exhibited without the special leave of the Court first obtained for that purpose. And unless the party exhibiting the same do first deposit with the registrar of this Court so much money, as together with the deposit by the rules of this Court to be made on obtaining a rehearing of the cause or causes wherein such decree was pronounced, will make up the sum of 50*l.*, as a pledge to answer such costs and damages as shall be awarded to the adverse party, in case the Court shall think fit to award any at the hearing of the cause on such supplemental or new bill" (k).

(i) Beam. Ord. 363.

(j) Moore v. Moore, 2 Ves. 598.

(k) Beames's Ord. 363.

(1) See Story Eq. Pl. § 425.

suit of 50*l.* being made, and the order for liberty to file supplemental bill, in the nature of a bill of review, being the same is then filed. The bill states the new facts, that the cause may be reheard. This suit is proceeded in the same manner as a bill of review on new matter, and by the same defences. Mitford says, "Bills in the nature of review do not appear subject to any peculiar manner, unless the decree sought to be reversed does to the interest of the person filing the bill" (7).

Supplemental  
Bill in the Na-  
ture, &c.

this difference, that in a supplemental bill in the nature of review, the Court will not, as on a bill of review, enquire, or vary it, or reverse the decree on the hearing, but will require that a petition of appeal or rehearing be presented, to come on and be heard with such bill. This was decided by Lord Hardwicke in *Moore v. Moore*, when a supplemental bill, in the nature of a bill of review, was to be heard without a petition of appeal or rehearing, was given to prefer such petition. So in *Perry v. Lord Eldon* said, "if a decree, not signed and enrolled, be reversed upon error apparent, and a petition of appeal has been presented, and also a supplemental bill is filed, stating new facts discovered since publication, the cause is to be heard upon the matter of that supplemental bill, and a rehearing of the original cause, and the Court reverse the decree upon the rehearing, taking into consideration the newly discovered facts."

Must be ac-  
companied by  
a petition.

In *v. Moore* (8), the cause came before the Court upon a partly supplemental, in the nature of a bill of review, matter said to be existing at the time of the former decree, and partly original as against one who had a petition of appeal from a decree made by the Court in the Rolls.

167.  
168.

(7) 17 Ves. 178.  
(8) 2 Ves. 598.

## CHAPTER XXXI.

## CROSS BILL.

Nature and  
purposes of.

As a defendant cannot pray any thing in his answer, except to be dismissed the Court, if he has any relief to pray, or discovery to seek, he must do so by a bill of his own, which is called a cross-bill (1).

A cross-bill is a bill brought by a defendant against a plaintiff, or other parties in a former bill depending, touching the matter in question in that bill (2). It is treated as a mere auxiliary suit, or as a dependency upon the original suit (3). And can be sustained only on matter growing out of the original bill (4).

To obtain discovery or relief.

A bill of this kind is usually brought either to obtain a necessary discovery of facts in aid of the defence to the original bill, or to obtain full relief to all parties, in reference to the matters of the original bill (5).

Ground of the necessity for a cross bill for discovery.

The rules of Equity prevent a defendant examining a plaintiff (6). Hence arises the necessity of a cross-bill for discovery, when the testimony of the plaintiff is sought by the defendant as to any material facts (7).

The cross-bill gives a perfect reciprocity of proof to each party, derivable from the answers of each other (8).

For example, a deed in the hands of the plaintiff may furnish the main grounds of establishing the defence to the original bill. If the defendant wants a discovery of that deed he must file a cross-bill for that purpose, although the plaintiff should state in his bill, that the deed is in his custody and ready to be produced as the Court shall direct (9).

It frequently happens, and particularly if any question arises

(1) Lubé Eq. Pl. 39.

(2) Mitford Eq. Pl. 80, 81; Story Eq. Pl. § 389, § 402; *White v. Buloid*, 2 Paige, 164.

(3) Story Eq. Pl. § 399; *Slason v. Wright*, 14 Vermont, 208.

(4) *Daniel v. Morrison*, 6 Dana, 186.

(5) Mitf. Eq. Pl. 81; Story Eq. Pl. § 389.

(6) *Colchester v. —*, 1 P. Wms. 595.

(7) Story Eq. Pl. § 390.

(8) Story Eq. Pl. § 390.

(9) *Spragg v. Corner*, 2 Cox, 109.

between two defendants to a bill, that the Court cannot make a decree without a cross-bill, or cross-bills to bring every matter in dispute completely before the Court (1).

Character and  
Objects.

In such a case it becomes necessary for some one of the defendants to the original bill to file a bill against the plaintiff and other defendants in that bill, or some of them, and bring the litigated point properly before the Court (2). One defendant cannot have a decree against a co-defendant without a cross-bill with proper prayer and process, or answer, as in an original suit (3).

A cross-bill is a mode of defence (4). The original bill and the cross-bill are but one cause (5). It must be confined to the subject-matter of the original bill, and cannot introduce new and distinct matters not embraced in the original suit, and if it do so, no decree can be founded on those matters (6).

Cross bill a  
defence.  
Original and  
cross-bill same  
suit.  
Confined to  
subject matter  
of original bill.  
Cross-bill con-  
fessed, evi-  
dence.

If a cross-bill is taken as confessed, it may be used as evidence against the plaintiff in the original suit, on the hearing, and will have the same effect as if he had admitted the same facts in an answer (7).

The plaintiff in a cross-bill cannot contradict the assertions in his answer in the original suit (8).

And where the allegations of a cross-bill are inconsistent with admissions of the answer, they cannot be taken as true though unanswerd (9).

A cross-bill may be filed to answer the purposes of a plea *puis venia continuance* at the common law. Thus, where pending a cross-bill, and after replication and issue joined, the defendant, having obtained a release, attempted to prove it, *viva voce*, at the hearing, the Court determined that the release not being in issue in the cause, the Court could not try the fact nor direct a trial at law for that purpose.

May answer  
the purposes of  
a plea *puis  
darrien con-  
tinuance*.

1) *Mitt. Eq. Pl.* by Jeremy, 81; *Rogers v. M'Macham*, 4 J. J. Marsh. 37; *sup v. Haight*, 1 Hopk. 239.

2) *Mitt. Eq. Pl.* by Jeremy, 81; *Cooper Eq. Pl.* 85; *Pattison v. Hull*, 9 Ves. 747.

3) *Talbot v. M'Gee*, 4 Monroe, 379. But see *Elliot v. Pell*, 1 Paige,

4) *Field v. Schieffelin*, 7 John. Ch. 252; *Galatian v. Erwin*, 1 Hopk. 8. C. 8 Cowen, 361; *Cartwright v. Clark*, 4 Metcalf, 194.

5) *Field v. Schieffelin*, 7 John. Ch. 252.

6) *May v. Armstrong*, 3 J. J. Marsh. 262; *Daniel v. Morrison*, 6 Dana, 5; *Galatian v. Erwin*, *Field v. Schieffelin*, *ubi supra*; *Gouverneur v. Mendorf*, 4 John. Ch. 357.

7) *White v. Buloid*, 2 Paige, 164.

8) *Hudson v. Hudson*, 3 Rand. 117.

9) *Savage v. Carter*, 9 Dana, 414.





For what and at what Time. purpose, and that a new bill must be filed to put the release in issue (1).

Set-off.

A cross-bill, if seasonably filed, may be sustained for the purpose of obtaining an equitable set off (2).

Lies to have an agreement relied on by plaintiff for a specific performance rescinded.

It lies to have an agreement, sought to be specifically performed, delivered up or cancelled, for although the plaintiff should obtain a decree under his original bill, he might still bring his action at law for damage sustained by the non-performance (3).

Not to rescind a different contract.

If the only object of a bill be to enforce a contract, a cross-bill to rescind a different contract, and with other parties, about the same property, will not lie. But where the vendor of land, among other things in his bill, asserts a lien for the purchase-money, against an assignee of his covenant for a title, the latter may sustain a cross-bill for a rescission of that contract (4).

Where a bill is filed to set aside an agreement or conveyance, the conveyance cannot be confirmed and established without a cross-bill filed by the defendant (5).

The defendant may rely upon matters purely legal, connected with the matters of the bill, for his defence, and, by his cross-bill, require the plaintiff to answer thereto (6).

It seems, that a cross-bill is always necessary, where the defendant is entitled to some positive relief, beyond what the scope of the plaintiff's suit will afford him (7).

At what time a cross bill may be brought.

If it is deemed advisable to file a cross-bill, it should be commenced with as little delay as possible, as will be apparent from a consideration of the particular rules, which are applicable to the proceedings in an original and cross-cause (8).

Proper time at the filing of the answer to the original suit.

The proper time for filing a cross-bill, where such a bill is necessary, is at the time of the putting in the answer to the original suit, and before the issue is joined by the filing of the replication. And as the matters of defence, upon which a cross-bill is founded, must be stated in the answer to the original suit as well as in the cross-bill, it can seldom be necessary to delay the filing of the cross-bill till after the original cause is at issue (9).

(1) Mitf. Eq. Pl. by Jeremy, 82; Hayne v. Hayne, 3 Ch. Rep. 19; 3 Swanst. 472, 474; Story Eq. Pl. § 393.

(2) Cartwright v. Clark, 4 Metcalf, 104. See Troup v. Haight, 1 Hopk. 239.

(3) Coop. Eq. Pl. 86, 87; Mont. Eq. Pl. 328.

(4) Wickliffe v. Clay, 1 Dana, 589.

(5) Connochan v. Christie, 11 Wheat. 446.

(6) Hume v. Long, 6 Monroe, 119.

(7) Pattison v. Hull, 9 Cowen, 747.

(8) 1 Smith Ch. Pr. (2nd Am. ed.) 460.

(9) Irving v. De Kay, 10 Paige, 319, 322. See Cartwright v. Clark, 4 Metcalf, 110, 111.

If the cross-bill is not filed before or at the time of answering At what Time.  
in the original suit, the delay must be accounted for, or the proceedings will not be stayed (1).

In *Cartwright v. Clark* (2), it was held, that, as a general rule, a cross-bill must be filed before publication of the evidence in the original suit, unless the plaintiff in the cross-bill will go to the hearing upon the proofs already published (3).

Upon hearing a cause, it sometimes appears, that the suit already instituted is insufficient to bring before the Court all matters necessary to enable it fully to decide upon the rights of all the parties (4). This most frequently happens where persons in opposite interests are co-defendants, so that the Court cannot determine their opposite interests upon the bill already filed, and the determination of their interests is yet necessary to a complete decree upon the subject-matter of the suit. In such a case, if upon hearing the cause the difficulty appears, and a cross-bill has not been exhibited to remove the difficulty, the Court will direct a bill to be filed, in order to bring all the rights of all the parties fully and properly for its decision, and will reserve the directions or declarations, which it may be necessary to give or make touching the matter not fully in litigation by the former bill, until this new bill is brought to a hearing (5).

And if a creditor, who has come in under a decree in favor of creditors against a debtor, should require relief, for the purpose of assisting the investigation of demands affecting the estate, before the Master, which relief cannot be obtained under the original bill, or by a rehearing, he may, even without the direction of the Court, file a cross-bill for the purpose (6); for he might not have had an opportunity, at an earlier stage of the proceedings, of presenting his case and his objections (7).

A cross-bill is prepared and signed by counsel, and engrossed

(1) *White v. Buloid*, 2 Paige, 164. See *Irving v. De Kay*, 10 Paige, 318, 222.

(2) 4 Metcalf, 104.

(3) See also to same point and effect, *Field v. Schieffelin*, 7 John. Ch. 252; *Gouverneur v. Elmendorf*, 4 John. Ch. 357; *Sterry v. Arden*, 1 John. Ch. 62; *Story Eq. Pl.* § 396; *White v. Buloid*, 2 Paige, 164.

(4) *Field v. Schieffelin*, 7 John. Ch. 252; *Story Eq. Pl.* § 396; *Cartwright v. Clark*, 4 Metcalf, 104.

(5) *Mitt. Eq. Pl.* by Jeremy, 82, 83; 1 Smith Ch. Pr. (2nd Am. ed.) 460; *Story Eq. Pl.* § 396; *Field v. Schieffelin*, 7 John. Ch. 253, 254; *Pattison v. Hall*, 9 Cowen, 747; *Cartwright v. Clark*, 4 Metcalf, 104.

(6) *Latouch v. Dunsany*, 1 Sch. & Lef. 137.

(7) *Story Eq. Pl.* § 397.

Frame  
and Matter of  
Cross-Bill.

How prepared,  
signed and  
filed.

and filed, in the same manner as an original bill (1). It seems, that in England, it is not indispensable, that a cross-bill should be filed in the same Court, in which the original bill is filed; as for example, if the original bill had been brought in the Court of Exchequer, whilst that Court had Equity jurisdiction, the cross-bill might be brought in the Court of Chancery (2).

Whether the like doctrine is maintainable in the Courts of America may admit of a question. But, at all events, there cannot be a cross-bill in a State Court to an original bill pending in the Circuit Court of the United States. If any cross-bill is wanted in such a case, it should be brought in the same Circuit Court in which the original bill is depending, as it is not an original, but an ancillary suit (3).

How framed

A cross-bill should state the original bill and the proceedings thereon, and the rights of the party exhibiting the bill, which are necessary to be made the subject of cross-litigation, or the ground, on which he resists the claims of the plaintiff in the original bill, if that is the object of the new bill (4).

Must be confined to subject matter of original bill.

It must be confined to the subject-matter of the original bill, and cannot introduce new and distinct matters not embraced in the original suit, and if it do so, no decree can be founded on those matters (5), for, as to such matters, it is an original bill, and they cannot properly be examined at the hearing of the first suit (6).

The plaintiff in a cross-bill cannot contradict the assertions in his answer in the original suit (7). And where the allegations of a cross-bill are inconsistent with the admissions of the answer to the original bill, they cannot be taken as true though unanswered (8).

Offer to pay sum really due upon usurious securities.  
Need not show any ground of Equity to support jurisdiction.

A demurrer was allowed to a cross-bill to have usurious securities delivered up, because it did not offer to pay the sum really due (9).

But as a cross-bill is considered a mode of defence, or a proceeding to procure a complete determination of a matter already in litigation in the Court, the plaintiff is not, at least, as against the plaintiff in the original bill, obliged to show any ground of

- (1) 1 Smith Ch. Pr. (2nd Am. ed.) 461.
- (2) Cooper Eq. Pl. 87; Glegg v. Legh, 4 Madd. 192; Parker v. Leigh, 6 Madd. 115; Story Eq. Pl. § 400, (3rd ed.) note (4).
- (3) Story Eq. Pl. § 400.
- (4) Ib.; Mitf. Eq. Pl. by Jeremy, 81; Story Eq. Pl. § 401.
- (5) May v. Armstrong, 3 J. J. Marsh. 262; Daniel v. Morrison, 6 Dana, 186; Galatian v. Erwin, 1 Hopk. 48; S. C. 8 Cowen, 361.
- (6) Ib. Ib. Ib.; Story Eq. Pl. § 401.
- (7) Hudson v. Hudson, 3 Rand. 117.
- (8) Savage v. Carter, 9 Dana, 414.
- (9) Mason v. Gardiner, 4 Bro. C. C. (Perkins's ed.) 436. See also ib. 438, note (a).

proceedings in the original suit, the cross-bill must be verified to stay proceedings.  
by a person, who knows the facts (4), and a certificate of proceedings.  
should be obtained, stating that he believes a stay of proceedings  
in the original suit, to be necessary for the attainment of  
in the cause, and that the cross-bill is not intended for  
(5).

Appearance of the defendant to a cross-bill is enforced in Appearance  
the same manner as to an original bill, by subpœna, a copy of how enforced,  
writ is served either personally on the defendant, or by and service of  
the same at his dwelling-house (6). An order for Subpœna.  
substitution, of the subpœna to appear, on the clerk in Court,  
concerned for the plaintiff in the original suit, is irreg-  
ular, there being no analogy between the case of a defendant to a  
bill, and that of a defendant to a bill in Equity to stay pro-  
ceedings at law, in which proceedings at law, the defendant is a  
(7).

One peculiarity in the proceedings of a cross-bill, is that the Plaintiff in  
the original cause is entitled to have an answer to his original cause  
before he can be compelled to answer the cross-bill. To sus- entitled to  
tain the privilege, however, the plaintiff in the original suit must priority of  
obtain an order for the purpose, which allows him a certain time answer.  
to answer the cross-bill, after the defendant, in the original cause,  
has answered to the original suit. This order may be ob-  
tained although the plaintiff in the cross-cause may be in a situa-  
tion to enforce an answer first; and it was in *Harris v. Harris* (8),  
that the plaintiff in the original cause, notwithstanding he,  
as defendant to the cross-cause, had obtained an order for time to

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Priority of Answer.



answer (1). Unless this order is obtained and served, the plaintiff in the cross-cause is at liberty to enforce an answer to his bill, by process of contempt, and thus altogether to deprive the first plaintiff of his priority of right to an answer (2). In *Turner v. Hill* and *Hill v. Turner* (3), the answer to the original bill was reported insufficient, and the plaintiff obtained an order to amend, and for the defendant to answer the amendments and exceptions at the same time. The defendant then filed a cross-bill. On the 6th of November, the plaintiff in the original suit obtained an order, that he should have a fortnight's time to answer the cross-bill, after answer to the original bill. Before the order was served on the defendant Hill, he issued an attachment against Turner for want of answer to the cross-bill. On the application of defendant Hill, the order of 6th of November was discharged (4).

At the expiration of the time allowed to answer the cross-bill after the original bill has been answered, the plaintiff in the cross suit is entitled to an answer to his bill, and the defendant in the cross suit is not entitled as of course to any further time (5).

To whom this priority extends.

The priority of answer, to which the original plaintiff is entitled, extends as against those, who claim as representatives of the plaintiffs, or one of them, in the cross cause. Thus in a case, where A brought his bill against B and C, who put in insufficient answers, and preferred their cross-bill against A; after which B became a bankrupt, and his assignees brought a bill in the nature of a bill of revivor against A; the court held, that the assignees of B should not go on till C had answered A's bill (6).

How priority lost.

The priority of answer, allowed to the plaintiff in the original cause, may be waived and transferred to the plaintiff in the cross-cause, by the plaintiff's amending his original bill in matters material (7) after the filing of the cross-bill (8).

By amendment.

The proceedings in the original suit are not stayed merely by the amendment (9), but the plaintiff in the cross-bill, upon material (7) amendments being made, must obtain an order, that the proceedings in the original bill be stayed until the plaintiff shall have fully answered the cross-bill (10).

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- (1) 1 Smith Ch. Pr. (2nd Am. ed.) 461, 462.
  - (2) *Ib.* 462.
  - (3) Cited 1 Smith Ch. Pr. (2nd Am. ed.) 462.
  - (4) 1 Smith Ch. Pr. (2nd Am. ed.) 462, 463.
  - (5) See *Noel v. King*, 3 Madd. 183; 1 Smith Ch. Pr. (2nd Am. ed.) 463.
  - (6) *Child v. Frederick*, 1 P. Wms. 266.
  - (7) So, it seems, though the amendment is in matter immaterial. *Johnson v. Freer*, 2 Cox, 371; *Noel v. King*, 2 Madd. 392.
  - (8) *Steward v. Roe*, 2 P. Wms. 435.
  - (9) *Noel v. King*, 2 Madd. 394.
  - (10) *Noel v. King*, 2 Madd. 394.

If such order is not obtained, the plaintiff in the original cause is warranted in issuing an attachment for want of an answer, and otherwise proceeding with his original suit (1). This last order, giving a priority of answer to the plaintiff in the cross-cause, may be obtained either upon a petition or a motion as of course (2).

Priority of Answer.

The reason why the plaintiff in the original cause loses his priority, is, that the amended bill as to the amendments is a new bill, and the cross-bill being filed prior to the amendments, and the original and amended bill being considered as one record, the priority of answer is lost as to the whole (3).

The general rule, that the plaintiff in the original suit loses his priority of answer, by materially amending the original bill, is not varied although the defendant has put in an insufficient answer, and although the order to amend is made on the terms, that the defendant may answer the amendments and exceptions together (4).

In *Long v. Burton* (5), after the answer to the original bill had been reported insufficient, the defendant filed a cross-bill. The plaintiff in the original suit obtained an order, that the original bill should be answered before he answered the cross-bill, and on the answer being reported insufficient, he obtained an order to amend his bill, and that the defendant might answer the amendments and exceptions together. It was held that the order to amend was a waiver of the priority of suit (6).

A plea was allowed to an original bill, then the defendant filed a cross-bill, to which an answer was put in, which was alleged to be insufficient. The plaintiff in the original suit then amended his bill, and the plaintiff in the cross-suit moved for time to answer the amended bill, after the defendant had answered the cross-bill. The motion was granted at the Rolls, and affirmed by the Lord Chancellor on the Master's report of insufficiency, which report was procured pending the motion (7).

An original bill abated by the act of the plaintiff, and not reversed until after a cross-bill filed, loses its priority (8). By abatement.

But the plaintiff in the original suit does not waive his priority by obtaining the common orders for time to answer the cross-bill (9).

not by obtaining common order to answer cross-bill.

(1) *Noel v. King*, 2 Madd. 394.

(2) 1 Smith Ch. Pr. (2nd Am. ed.) 464.

(3) *Steward v. Roe*, 2 P. Wms. 434.

(4) *Meade v. Duchess of Buckingham*, cited 1 Smith Ch. Pr. (2nd Am. ed.) 464.

(5) 2 Atk. 218.

(6) See 1 Smith Ch. Pr. (2nd Am. ed.) 464.

(7) *Rattray v. Darley*, 3 Atk. 724.

(8) *Smart v. Floyer*, Dick. 260.

(9) *Harris v. Harris*, 1 Turn. & Russ. 165; — *v. Southall*, 1 Younge, 330.

**Staying Proceedings.**

Staying proceedings in the original suit.

Although the plaintiff in the original suit is entitled to stay the proceedings in the cross-suit, until the defendant in the original suit has answered, the plaintiff in the cross-suit has not the same privilege, unless the original plaintiff by amending his bill loses his priority of suit (1).

The plaintiff in the original suit is not obliged, in any case, to stay proceedings thereon upon the filing of a cross-bill, except by a special order of the Court (2), founded on notice of the application for delay, given to the plaintiff in the original suit (3). And it is not a matter of course for the Court to stay the proceedings in the original suit, in any case, except where the defendant in the cross-suit is in contempt for not answering (4).

All the plaintiffs in the cross-bill should apply.

All the plaintiffs in the cross-bill must join in the application to stay proceedings. And to entitle them to an order to stay the proceedings, it is necessary the matters stated in the cross-bill should be sworn to by some person, who knows the facts (5).

Enlargement of publication.

In *Ramkenssensent v. Barker* (6) it is laid down, that the general rule is not to stay proceedings in an original cause till the answer comes in to the cross-bill, but only to enlarge publication in the original cause, until the plaintiff in that cause shall have fully answered the cross-bill; and in *Coates v. Pearson* (7) the Court refused to stay the progress of an original cause, which had been set down, although no answer had been filed to the cross-bill, observing, if the cross-bill is filed in due time, the plaintiff in the cross-suit may move to stay publication in the original cause until an answer has been put in (8). And the circumstance of the defendant to the cross-bill being in contempt for want of his answer to that bill, does not entitle the plaintiff in the cross-suit to stay proceedings in the original cause, but only to enlarge publication (9).

In *Young v. Potts* (10), after the cause on the original bill was set down for hearing, the defendant was informed, that the plaintiff was a nominal one, and that the real plaintiff was a citizen

(1) 1 Smith Ch. Pr. (2nd Am. ed.) 465.

(2) *White v. Buloid*, 2 Paige, 164.

(3) *Cartwright v. Clark*, 4 Metcalf, 104; *White v. Buloid*, 2 Paige, 164.

(4) *White v. Buloid*, 2 Paige, 164.

(5) *Talmdge v. Pell*, 9 Paige, 410.

(6) 1 Atk. 20.

(7) 4 Madd. 20.

(8) See *Gardiner v. Mason*, 4 Bro. C. C. 436, cited 1 Smith, Ch. Pr. (2nd Am. ed.) 465.

(9) *Creswick v. Creswick*, 1 Atk. 291; Story Eq. Pl. § 395. See *White v. Buloid*, 2 Paige, 164, and *Young v. Potts*, 4 Wash. C. C. 521.

(10) 4 Wash. C. C. 521.

of the same State with the defendant, (which deprived the Court of jurisdiction) and he immediately filed a cross-bill, charging this fact, and asking a discovery, and the hearing on the original bill was stayed until the cross-bill was answered (1). Hearing and Evidence.

After answer the defendant filed a cross-bill. The plaintiff in the original cause, before filing his answer to the cross-bill, filed a supplemental bill against the plaintiff in the cross-suit. The plaintiff in the cross-suit moved to stay the answer to the supplemental bill until his cross-bill had been answered, which was ordered upon debate (2). So where the original bill abated before answer by the marriage of the plaintiff, and, before revival, the defendant filed a cross-bill, Lord Hardwicke held that the plaintiffs in the original cause lost their priority of answer, and discharged the order obtained by them for a month's time to answer the cross-bill, after the original bill was answered (3).

The original cause and cross-cause are usually, although not necessarily (4), heard together, and they are considered so united, that the plaintiff in the cross-cause is bound to set down his cause in the same Court as that in which the original cause is set down (5). Original and cross-cause heard together.

This applies where both causes are at issue or in a situation to be heard, and then the plaintiff in the cross-suit may have an order, that they be heard together. But the delay of the plaintiff in the cross suit will not be permitted to delay the hearing of the original cause (6). The order, that the causes may be heard together, is obtained on a motion *ex parte*, and a copy of the order should be served (7).

In *Field v. Schieffelin* (8), it is said, "for whatever purpose the cross-bill may be used, if it comes in after publication, the plaintiff in it cannot take proof to any point, to which he has already examined, for this would contravene the principles of the Court." "The object of the rule is to prevent the danger of perjury." (9). Evidence in cross-suit.

The depositions in the cross-cause, to distinct matters, can of

(1) See *Brown v. Beel*, 4 Hayw. 287.

(2) *Urquhart v. Turner*, cited 1 Smith Ch. Pr. (2nd Am. ed.) 466.

(3) *Smith v. Floyer*, Dick. 262.

(4) *Coleman v. Moore*, 3 Litt. 355.

(5) 1 Smith Ch. Pr. (2nd Am. ed.) 468. See Story Eq. Pl. § 395.

(6) *White v. Buloid*, 2 Paige, 164. See Story Eq. Pl. § 395.

(7) *Hand's Sol. Ass.* 106; *Hinde*, 54.

(8) 7 John. Ch. 252, 253.

(9) See Story Eq. Pl. § 395; *White v. Buloid*, 2 Paige, 164; *Wilford v. Beasley*, 3 Atk. 501; *Taylor v. Obee*, 3 Price, 26, 83; *Kinsey v. Kinsey*, 2 Vesey Sen. 578.



Testimony. course be read; and if no witnesses have been examined in the original suit, the testimony in the cross-suit can be used (1).

So if no witnesses are examined in the cross-suit, the depositions in the original suit may be read. But the point in issue must be the same in both causes (2).

The testimony taken in a cross-cause may be read, although the bill be dismissed,—saving just exceptions (3).

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(1) *Wilford v. Beasley*, 3 Atk. 501.

(2) *Christian v. Wrenn*, Bunbury, 321.

(3) *Lubiere v. Genon*, 2 Vesey, Sen. 579. See *Christian v. Wrenn*, Bunbury, 321.

## CHAPTER XXXII.

### BILL OF INTERPLEADER.

When two or more persons claim the same thing, by different Nature and  
separate interests, and another person, not knowing to which objects of  
claimants he ought of right to render a debt or duty, or to  
property in his custody, fears he may be injured by some  
he may exhibit a bill of interpleader against them (1).  
Ground of the jurisdiction, in a simple bill of interpleader, Ground of ju-  
risdiction.  
Ground of injury to the plaintiff from the doubtful and con-  
flicting claims of these several defendants, as between themselves (2).  
Ground made upon a party affords a ground for his filing a bill Claim, ground  
interpleader, though no legal proceedings have been actually for filing,  
brought against him (3).  
Ground of liability to be called on by different persons for the debt or liability.  
Ground as a right to file such a bill, to determine which of the  
claimants is entitled (4).

Eq. Pl. by Jeremy, 48, 49; *Dungey v. Angove*, 2 Sumner's Vesey, 10; *Angell v. Hadden*, 15 ib. 244; *Eden Injunct.* (2nd Am. ed.)  
*Stevenson v. Anderson*, 2 Ves. & Bea. 407; *Morgan v. Marsack*,  
107; *Story Eq. Pl.* § 291, 292; *Crawshaw v. Thornton*, 7 Sim.  
1; 2 *Craig & Phill.* 1, 21; *Bedell v. Hoffman*, 2 Paige, 199; *At-*  
*Manks*, 1 Cowen, 691.

*Part v. Cutts*, 1 *Craig & Phill.* 204, Lord Cottenham said; "The  
ground of interpleader is not, and cannot now be disputed. It is where  
I say, I have a fund in my possession, in which I claim no per-  
sonal interest, and to which you, the defendants, set up conflicting claims;  
I will bring the fund into Court, and you shall contest  
yourselves. The case must be one in which the fund is matter  
between two parties, and in which the litigation between those  
parties decides all their respective rights with regard to the fund." See  
*Eq. Jur.* § 817b; *Shaw v. Coster*, 8 Paige, 339; and generally  
subject, 2 *Story Eq. Jur.* § 800 to 824.

*Bank & Hudson R. R. Co. v. Clute*, 4 Paige, 392; *Mitt. Eq. Pl.*  
1, 49; *Atkinson v. Manks*, 1 Cowen, 703; *Langston v. Boylston*,  
1 Vesey, 101, note (a); *Story Eq. Pl.* § 291, 292; *Eden Injunct.*  
1d. 395, 396, 397.

*Langston v. Boylston*, 2 Sumner's Vesey, 101, 107, note (1) and cases  
cited; *Angove*, ib. 310; *Angell v. Hadden*, 15 ib. 247, Mr. Hovenden's  
note (1); *Richards v. Salter*, 6 John. Ch. 445; *Morgan v. Marsack*,

note of *Bolton v. Williams*, 2 Sumner's Vesey, 152; *East India Co. v.*  
8 ib. 377; *Angell v. Hadden*, 15 ib. 247, Mr. Hovenden's note (1).

**When it may be Sustained.** A bill of interpleader may be filed, though the claim of one of the defendants is actionable at Law and that of the other in Equity (1).

**Claims may be both at law and in Equity.** It is no objection to an interpleading bill, that a suit between the several parties, commenced by one of the claimants of the fund, is pending (2).

**Plaintiff can claim no interest;** The plaintiff in a bill of interpleader, strictly so called, can claim no relief against either of the defendants, but only ask for leave to pay the money or deliver the property to the one to whom it, of right, belongs, in order that he may thereafter be protected from the claims of both. This bill should not be filed, except in a case, where the plaintiff can in no other way, be protected from an unjust litigation, in which he has no interest (3).

**if he does he cannot sustain the bill.** If the plaintiff himself claims any interest in the property in dispute, he cannot sustain the bill (4).

As if an action is brought against an auctioneer for a deposit, he cannot file a bill of interpleader, if he insists upon retaining either his commission or the duty (5).

**Plaintiff wrong doer as to either defendants.** The plaintiff cannot sustain this bill where he is obliged to admit, that as to either of the defendants he is a wrong doer (6).

**Claims of defendants must not be of different natures.** Where the claimants assert their rights under adverse titles, and not in privity, and where their claims are of different natures, the bill is wholly unmaintainable (7).

**When bill may be dispensed with** Where the party holding the fund may be discharged from all liability by payment and delivery to one, a bill of interpleader may be dispensed with (8).

It is not necessary to file a bill of interpleader, where the holder of the fund is already a party to a suit in chancery, brought by one claimant against the other, to settle the right to the fund in his hands. The holder of the fund, in such a case, should apply by petition in that suit, for leave to pay the fund into Court, to

(1) *Richards v. Salter*, 6 John. Ch. 445; *Yates v. Tisdale*, 3 Edw. 71; *Doran v. Everitt*, 2 Irish Eq. 28; *Paris v. Gilham*, Cooper, 56; *Martinus v. Helmuth*, 2 Ves. & Bea. 412 (2nd ed.); *Morgan v. Marsack*, 2 Mer. 107.

(2) *Warrington v. Wheatstone*, 1 Jac. 202.

(3) *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, 2 Paige, 209; *Atkinson v. Manks*, 1 Cowen, 691.

(4) *Atkinson v. Manks*, 1 Cowen, 691; *Moore v. Usher*, 7 Sim. 384; *Mitchell v. Hayne*, 2 Sim. & Stu. 63; *Aldridge v. Thompson*, 2 Bro. C. C. (Perkins's ed.) 150.

(5) *Mitchell v. Hayne*, 2 Sim. & Stu. 63.

(6) *Shaw v. Coster*, 8 Paige, 339; *Quinn v. Green*, 1 Ired. Eq. 229.

(7) *Mitf. Eq. Pl. by Jeremy*, 142, 143, note (r); *Dungey v. Angove*, 2 Sumner's Vesey, 304; *Nicholson v. Knowles*, 5 Madd. 47; *Harlow v. Crowley*, 1 Buck B. C. 273; *Story Eq. Pl. § 293*; *Crawshaw v. Thornton*, 7 Sim. 391; *Jew v. Wood*, 3 Beav. 579; *S. C. 1 Craig & Phil. 185*; *City Bank v. Bangs*, 2 Paige, 570.

(8) *Schuyler v. Pelissier*, 3 Edw. 191.

side the event of the litigation between the other parties (1). But <sup>When it may be Sustained.</sup> the case of *Birch v. Corbin* (2), where money in the funds was the subject of a suit, to which the bank was a defendant, Lord Burrows refused, upon the application of the bank, to make any order upon the litigating parties, to restrain them from proceeding at law against the bank, to compel a transfer. He said the bank must be considered as a private person, who is a stake holder, and such was most certainly entitled to file a bill of interpleader; and it was certainly necessary for them to apply in the shape of plaintiffs (3).

A bill of interpleader ought to be filed before, or immediately after the commencement of proceedings at law, and should not be delayed until after a verdict or judgment has been obtained (4).

Where the plaintiff had offered to pay over the fund, on being indemnified, and that being refused, had filed his bill, with reasonable diligence, he was not charged with *interest* on the money deposited in Court (5).

Where a deposit is paid to an auctioneer at a sale, and there arises a dispute between the vendor and a purchaser, and an action is commenced or threatened by either for the deposit, there is no remedy of the auctioneer is by this description of bill (6). <sup>Cases in which a bill of interpleader will be sustained. Auctioneer.</sup>

A party, who is taxed in two different towns for the same property, which is only liable to be taxed once, it being doubtful to which town the right to tax belongs, may file a bill of interpleader to compel the collectors of the tax to settle the right between themselves (7). <sup>Party called upon to pay taxes in two different towns.</sup>

Underwriters may sustain this bill against the different creditors of an insolvent debtor, claiming the fund proceeding from an insurance made for account of the debtor, some on the ground of special liens, and others under the assignment. But upon such a bill, those of the co-defendants, who fail to establish any right to the fund, are not entitled to an account from the defendant whose claims are allowed, of the amount and origin of those claims (8). <sup>Underwriters.</sup>

(1) *Badeau v. Rogers*, 2 Paige, 209.

(2) 1 Cox, 144.

(3) See *Eden Injunct.* (2nd Am. ed.) 400, 401.

(4) *Cornish v. Tanner*, 1 Younge & Jer. 333.

(5) *Richards v. Salter*, 6 John. Ch. 445.

(6) *Mitchell v. Hayne*, 2 Sim. & Stu. 63. See *Farebrother v. Prattent*, Daniel's Rep. 64.

(7) *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 384; *Thompson v. Hobbs*, 1 Hopk. 272; *Redfield v. Supervisors of Genesee Co.* 1 Clarke, 42.

(8) *Spring v. South Car. Ins. Co.* 8 Wheat. 268.

|                                                                                                                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
|--------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| When it may<br>be Sustained.                                                                                                                     | A bill of interpleader lies upon color of title given to a stranger; as where A contracted to supply B with certain articles at certain prices, and A afterwards assigned the contract to C, and C made demand on B, B is entitled to make A and C interplead (1).                                                                                                                                                                                              |
| Warehouse-<br>man.                                                                                                                               | In a case where A deposited goods with B, a warehouseman, to await his direction, and afterwards A directed B to transfer the goods to C, and to hold them at his disposal, and B made the transfer accordingly, the goods were then claimed by D as having been consigned to him by A. It was held, that B was entitled to file a bill of interpleader against C and D (2).                                                                                    |
| Master of a<br>vessel.                                                                                                                           | A master of a vessel may maintain such a bill, where parties claim adversely under the bill of lading, but not where the adverse claims are not under the bill of lading, but paramount to it (3).                                                                                                                                                                                                                                                              |
| Agent.                                                                                                                                           | So an agent, who has received bills of exchange, to procure payment for his principal, may compel the principal, and a claimant, and a creditor of the claimant, to interplead (4).<br>Where a principal has created a lien in favor of another person, on funds in the hands of his agent, the agent may file a bill of interpleader against the principal and the other claimant (5).                                                                         |
| Attorney.                                                                                                                                        | An interpleader was allowed, in a case, where an attorney claimed a lien upon a sum awarded as damages, under a judgment obtained by the client against the plaintiff (6).                                                                                                                                                                                                                                                                                      |
| Defendant in<br>a judgment.                                                                                                                      | A defendant who wishes to obtain an injunction against a judgment, on the ground that he cannot safely pay it, may file a bill of interpleader against the parties appearing to be entitled, and pay the money into court, to be held for the benefit of the party appearing to be entitled (7).                                                                                                                                                                |
| Cases in which<br>this bill will<br>not be sus-<br>tained.<br>When plaintiff<br>has parted<br>with posses-<br>sion.<br>Or has never<br>taken it. | To maintain this bill, the plaintiff must be in possession. A plaintiff having parted with the possession of property, cannot sustain an interpleading bill against different claimants, upon an undertaking to pay over the value to the party entitled (8).<br>So where an administrator has never reduced the assets into possession, but they are in the hands of some of the distributees, who claim adversely to him, he cannot maintain a bill of inter- |

(1) *East India Co. v. Edwards*, 18 Sumner's Vesey, 376.(2) *Pearson v. Cardon*, 4 Sim. 218. See *Mason v. Hamilton*, 5 Sim. 19; *Cooper v. De Tastet*, Tamlyn, 177.(3) *Lowe v. —*, 3 Madd. 277; *Mont. Eq. Dig.* 236. But see *Eden Injunct.* (2nd Am. ed.) 397, 398.(4) *Stevenson v. Anderson*, 2 Ves. & Bea. 407.(5) *Smith v. Hammond*, 6 Sim. 16; *Wright v. Ward*, 4 Russ. 215, 220; 2 Story Eq. Jur. § 817a.(6) *— v. Bolton*, 18 Sumner's Vesey, 292.(7) *Fowler v. Lee*, 10 Gill & John. 353.(8) *Burnett v. Anderson*, 1 Mer. 405.

leader against them (1). An executor cannot file a bill of this character before he has proved the will (2). When it cannot be Sustained.

But in a case in Connecticut where the plaintiff had paid over the money to one of the defendants, under a claim of right to which he was bound to submit, it was held that this did not prevent his sustaining the bill (3). Executor.

The sheriff levying upon goods alleged to be in settlement cannot maintain a bill of interpleader (4). Sheriff.

A sheriff, who by virtue of an execution, levies upon property claimed by a third person, cannot file a bill of interpleader against such third person and the plaintiff in the execution, to have them settle the right to the property between themselves (5).

If the plaintiff does not show a clear title in himself to sustain the bill, it will be dismissed, however proper in other respects the case might be for an interpleader. Thus, if the bill should show, that the title of the plaintiff is that of an agent for one of the parties only, as if he had received money by the authority of his principal and for his use, he would be bound to pay over the money to his principal, notwithstanding any intervening claims of a third person; for a mere agent to receive for the use of another cannot be converted into an implied trustee by reason of an adverse claim, since his possession is the possession of his principal (6). Where plaintiff does not show title in himself to sustain the bill.  
Agent.

A tenant cannot, as a general rule, sustain a bill of interpleader against his landlord merely on the ground, that a stranger sets up an adverse title to the estate (7); for it would be extremely mischievous, if a tenant were allowed (in his own right or that of others) to call in question the title of the person under whom he holds (8). Besides, in such case, the landlord and stranger cannot

(1) *Martin v. Maberry*, 1 Dev. Eq. 169.

(2) *Mitchell v. Smart*, 3 Atk. 606.

(3) *Nash v. Smith*, 6 Conn. 421, 427. See also to the same effect, *Jew v. Wood*, 1 Craig & Phil. 185; S. C. 3 Beav. 579.

(4) *Slingsby v. Boulton*, 1 Ves. & Bea. 334; 1 Smith Ch. Pr. (2nd Am. ed.) 472, 473.

(5) *Shaw v. Coster*, 8 Paige, 339; *Quinn v. Green*, 1 Ired. Eq. 229. But see *Storrs v. Payne*, 4 Hen. & Munf. 506.

(6) Mitf. Eq. Pl. by Jeremy, 142, 143; *Nicholson v. Knowles*, 5 Madd. 17; *Lowe v. Richardson*, 3 Madd. 277; 2 Story Eq. Jur. § 814-820, and notes; *Crawshay v. Thornton*, 7 Sim. 391. An interpleader between principal and agent is admissible only where the claim is under a derivative and not under an adverse title. *Crawshay v. Thornton*, 2 Mylne & Craig, 23; *Pearson v. Cardon*, 2 Russ. & My. 606, 607, 610.

(7) *Dungey v. Angove*, 2 Sumner's Vesey, 304; *Johnson v. Atkinson*, 3 Anstr. 800; Story Eq. Pl. § 294; 2 Story Eq. Jur. § 812; *Clarke v. Byne*, 12 Ves. 383, 386.

(8) *Smith v. Target*, 2 Anstr. 531; *Homan v. Moore*, 4 Price, 7; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (6); *Eden*

When it may be Sustained and when not. not claim the same debt or duty. The rent due upon the demise to the tenant is a different demand from that which some other person may have upon the occupation of the premises (1).

Where landlord has given color of title to another after lease. But this general rule has exceptions; for instance, where the landlord has, by his own act, given color of title to another, subsequently to the lease, he may thereby have entangled the tenant in embarrassments, which a bill of interpleader may be the most proper mode of quieting (2).

Mortgagor and mortgagee, &c. To support a bill of interpleader by a tenant, two persons must claim the same rent in privity of tenure, or of contract, as in the case of mortgagor and mortgagee, trustee and cestui que trust (3) lessor and his assignees subsequently to the lease (4).

Underwriters. An insurance company was allowed to file a bill of interpleader against a landlord, who brought an action on the policy, and against the tenant, who filed a bill to have it laid out in rebuilding on the premises, and the plaintiffs' costs were paid out of the fund in Court (5).

Modus and titles. Where one rector claims a modus, and a rector of another parish claims tithes in kind of the same lands, they cannot be made to interplead (6).

Two purchasers claiming separate deposits. If an estate is put up for sale at auction, and A becomes the purchaser and pays his deposit; and then, by order of the same owner, it is set up again for sale, and B becomes the purchaser and pays his deposit; such a case does not afford a proper ground for interpleader, if each demands his deposit from the stakeholder; for A and B do not claim in privity, and their deposits are distinct (7).

One defendant clearly entitled. Such a bill will not be sustained where it appears, from the bill itself, that one of the defendants is clearly entitled to the debt or duty claimed to the exclusion of the other (8).

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Injunct. (2nd Am. ed.) 398, 399; Story Eq. Pl. § 294; *Lowe v. Richardson*, 3 Madd. 277.

(1) *Dungey v. Angove*, 2 Sumner's Vesey, 310; Story Eq. Pl. § 294.

(2) *Cowtan v. Williams*, 9 Sumner's Vesey, 107; *Clarke v. Byne*, 13 il 386; *East India Co. v. Edwards*, 18 ib. 378; *Hoggart v. Cutts*, 1 Craig & Phil. 197, 205; 2 Story Eq. Jur. § 811-821; *Dungey v. Angove*, 3 Bro. C. C. (Perkins's ed.) 36, note (1); *Angell v. Hadden*, 16 Ves. 202.

(3) *Dungey v. Angove*, 2 Sumner's Vesey, 312; 1 Smith Ch. Pr. (2nd Am. ed.) 470; Story Eq. Pl. § 294; *Hoggart v. Cutts*, 1 Craig & Phil. 197, 205; 2 Story Eq. Jur. § 811-821; *Eden Injunct.* (2nd Am. ed.) 399, 400.

(4) *Cowtan v. Williams*, 9 Sumner's Vesey, 107; *Clark v. Byne*, 13 il 383.

(5) *Paris v. Gilham*, Cooper, 56.

(6) *Woolaston v. Wright*, 3 Anst. 301.

(7) *Hoggart v. Cutts*, 1 Craig & Phil. 197, 205; Story Eq. Pl. § 294.

(8) *Mohawk & Hudson R. R. Co. v. Clute*, 4 Paige, 484.

intiff in a bill of interpleader must state his own rights  
 veral claims of the defendants, and pray that they may  
 so that the Court may adjudge to whom the thing in con-  
 elongs, and the plaintiff may be indemnified (1). What must be  
set forth in  
Bill.

intiff should negative any interest in himself in the mat- Plaintiff  
should nega-  
tive any inter-  
est in himself,  
and show  
himself ig-  
norant or  
doubtful of  
defendant's  
rights.  
 ntroversy (2), and show, that he is a mere stakeholder (3),  
 is ignorant of the rights of the respective parties, who  
 upon by him to interplead; or, at least, he must  
 there is some doubt to which of such parties the debt  
 longs; so that he cannot safely pay or render it to one,  
 sk of being made liable for the same debt or duty to the

ims of the defendants should be specifically set forth, so Reason for  
setting out  
claims of de-  
fendants.  
 may appear to be of the same nature and character, and  
 ject of a bill of interpleader (5).

ears from the bill, that one defendant is entitled to the Demurrer if  
only one  
appears to  
be entitled.  
 ty and that the other is not, both defendants may de-

intiff should always show a clear title in himself to main- Plaintiff must  
show clear  
right in him-  
self,  
 ill; for otherwise the bill will be dismissed, however  
 other respects, the case may be for an interpleader (7).

ll should also show, that there are proper persons in and proper  
persons in  
esse to inter-  
plead.  
 ple of interpleading, and of setting up opposite claims;  
 ise the objects of the bill would be unattainable (8).

intiff should also admit a title against himself in each of Must admit  
title in each  
claimant.  
 nts, and that each of them claims a right, and such  
 they may interplead for (9).

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Eq. Pl. by Jeremy, 49, 141, 142; Story Eq. Pl. § 292.

Eq. Pl. § 292.

v. Coster, 8 Paige, 339; Badeau v. Rogers, 2 Paige, 209; Story

v. Coster, 8 Paige, 339; Mohawk v. Hudson R. R. Co. v.  
 ige, 384, 392.

Eq. Pl. by Jeremy, 142, 143; Story Eq. Pl. § 293; Hoggart v.  
 sig & Phil. 197, 205; 2 Story Eq. Jur. § 807 to 821. For the  
 ayer in a bill of interpleader, see Story Eq. Pl. (3d ed.) § 297,

v. Coster, 8 Paige, 339; Mitf. Eq. Pl. by Jeremy, 142; Story  
 2. See the form of such demurrers, Willis, 440, 441.

Eq. Pl. § 292, 296; Mitf. Eq. Pl. by Jeremy, 142.

Eq. Pl. § 295; Metcalf v. Hervey, 1 Ves. Sen. 248, 249; 2 Sto-  
 § 821.

ry Eq. Jur. § 821; Story Eq. Pl. § 295; Slingsby v. Boulton, 1  
 .. 334; Atkinson v. Manks, 1 Cowen, 691; Quinn v. Green, 1  
 9.



Money brought  
into Court.

If suits at law have been commenced against the plaintiff, he may pray that the claimants may be restrained from proceeding till the right be determined (1). But he cannot pray an injunction to stay proceedings in ejectment (2).

In a case where a sheriff was allowed to file a bill of interpleader, to settle the rights of property taken in execution, to which there were conflicting claims, an injunction to stay any suit against him, in case of his selling the property, was refused on the ground, that the law provided him an ample remedy (3).

Bill not demurrable if money not offered.

The fund in dispute must be brought into Court before the plaintiff can take any step in the cause (4). But the bill is not demurrable because the plaintiff does not offer to pay the money into Court (5).

If money not paid in security to be given.

If the plaintiff does not pay the money into Court he should at least give bond and security for its ultimate payment, according to the decree (6).

Offer of value of goods claimed not sufficient.

If the claim is for goods, it is not sufficient to bring the value of them into Court (7).

Money paid over to one defendant on claim.

If the plaintiff has paid over the money to one of the defendants on a claim of right, to which he was bound to submit, this will not preclude him from sustaining the bill (8).

Money must be brought into Court before injunction.

Whenever the bill contains a prayer for an injunction, the money must be brought into Court before the Court will ordinarily act upon this part of the prayer (9).

Condition precedent to an injunction.

The common order for an injunction, on a bill of this nature, is, that it issue upon the plaintiff paying the money into Court. This is a condition precedent, and an order for an injunction, not containing it, will be discharged. If the money cannot be paid

(1) Mitf. Eq. Pl. by Jeremy, 49, 143; Story Eq. Pl. § 297.

(2) Metcalf v. Hervey, 1 Ves. Sen. 248.

(3) Storrs v. Payne, 4 Hen. & Munf. 506.

(4) Meux v. Bell, 6 Sim. 175; Mitf. Eq. Pl. by Jeremy, 49, 143; Story Eq. Pl. § 291; Mohawk v. Hudson R. R. Co. v. Clute, 4 Paige, 384; Shaw v. Coster, 8 Paige, 339; City Bank v. Bangs, 2 Paige, 570, 573; Nash v. Smith, 6 Conn. 421; Atkinson v. Manks, 1 Cowen, 691.

(5) Meux v. Bell, 6 Sim. 175; 1 Smith Ch. Pr. (2nd Am. ed.) 476.

(6) Biggs v. Kouns, 7 Dana, 411.

(7) Burnett v. Anderson, 1 Mer. 405.

(8) Nash v. Smith, 6 Conn. 421; Jew v. Wood, 1 Craig & Phil. 185.

(9) Story Eq. Pl. § 297; Mohawk & Hud. R. R. Co. v. Clute, 4 Paige, 384, 391; Richards v. Salter, 6 John. Ch. 445; Biggs v. Kouns, 7 Dana, 410; Dungey v. Angove, 3 Bro. C. C. (Perkins's ed.) 36, 37, note (a); 2 Story Eq. Jur. § 809; Fowler v. Lee, 10 Gill & John. 353; Eden Injunct. (2nd Am. ed.) 403.

in, in time to stay a trial, application should be made to the injunction officer, to vary the order on the special grounds (1). Affidavit of Facts and No collusion.

In *Langston v. Boylston* (2), it was held, that in support of a motion for an injunction, on an interpleading bill, affidavits of the facts may be read; as it is exactly on the footing of waste (3). Affidavits of facts not necessary.  
But this is not now required (4).

To a bill of interpleader, it is requisite that the plaintiff should make an affidavit "that this bill is not filed in collusion with either of the defendants in the said bill named, but merely of his own accord, for relief in this Honorable Court" (5). Affidavit of non-collusion.

The want of such an affidavit is a ground of demurrer (6). Want of it ground of demurrer.

Where the bill is filed by the officer of a company, on behalf of the company, the affidavit annexed ought to state, not that the plaintiff does not collude, but that to the best of his knowledge and belief, the company do not collude, with the defendants (7). Affidavit when bill is filed by an officer of a company.

But by the practice in Connecticut it is not necessary to annex this affidavit of non-collusion (8). Not necessary in Connecticut.

Collusion will not be presumed against this affidavit, nor can a counter affidavit prevail against it (9). Counter affidavit not allowed.

But where there is a suspicion of collusion, the Court will direct an inquiry into the circumstances (10). Circumstance may be examined.

The plaintiff need not swear, that the bill is filed at his own expense (11). Nor that it was filed without the knowledge of either of the defendants (12).

(1) *Sieveking v. Behrens*, 2 Mylne & Cr. 581.

(2) 2 Ves. Jun. 101.

(3) See *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (2). See *Eden Injunct.* (3rd Am. ed.) 402, 403.

(4) *Walbank v. Sparkes*, 1 Sim. 385.

(5) 1 Smith Ch.Pr. (2nd Am. ed.) 474; *Eden Injunct.* (2nd Am. ed.) 401; *Shaw v. Coster*, 8 Paige, 339; 2 Hoff. Ch. Pr. 103; *Tobin v. Wilson*, 3 J. J. Marsh. 67; *Biggs v. Kouns*, 7 Dana, 411; *Mitf. Eq. Pl.* by Jeremy, 143; *Atkinson v. Manks*, 1 Cowen, 691; *Story Eq. Pl.* § 291, 297; *Stevenson v. Anderson*, 2 Ves. & B. 410; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (5); 2 *Story Eq. Jur.* § 809.

(6) *Mitford Eq. Pl.* by Jeremy, 143; *Metcalf v. Hervey*, 1 Ves. Sen. 248; *Tobin v. Wilson*, 3 J. J. Marsh. 67. See the form of demurrer for want of such an affidavit, *Willis*, 442; 2 *Eq. Drafts*, (2nd ed.) 77.

(7) *Bignold v. Audland*, 11 Sim. 23.

(8) *Naah v. Smith*, 6 Conn. 421. See *Jerome v. Jerome*, 5 Conn. 352.

(9) *Langston v. Boylston*, 2 Sumner's Vesey, 101.

(10) *Dungey v. Angove*, 2 Ves. Jun. 304; *Eden Injunct.* (2nd Am. ed.) 401.

(11) *Metcalf v. Hervey*, 1 Ves. Sen. 248; *Eden Injunct.* (2nd Am. ed.) 401.

(12) *Stevenson v. Anderson*, 2 Ves. & Bea. 410; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (5).

- Affidavits and Injunction.** The bill may be either made an exhibit, and be referred to the affidavit, or the affidavit may be annexed to it. If made an exhibit, the Master indorses on the back of it, "This par writing was produced and shown to A. B., and is the same referred to in his affidavit, sworn, the — day of —" If the bill is not exhibited, but the affidavit is annexed to the words of the affidavit then should be "that the bill hereu nexed," instead of "this bill." The affidavit is filed with the bill (1).
- Bill an exhibit or affidavit annexed.**
- Motion for an injunction.** The interpleading plaintiff, immediately on filing his bill, accompanied by the affidavit of non-collusion, may, without waiting the appearance of the defendants, and even before a subpoena has been served, move *ex parte* for an injunction to restrain proceedings at law commenced against him, offering to pay the costs of the dispute into court (2).
- Where defendant has appeared.** If the defendant has appeared, he is served with a notice of motion (3).
- Reading affidavit of facts dispensed with.** It appears to have been the practice to read an affidavit of facts, on the motion for an injunction (4). But this is no longer required (5).
- Not like common injunction.** In *Croggon v. Symons* (6), the Vice-Chancellor refused to grant an injunction at once to stay proceedings at law in an interpleading suit, and assimilated it to the common injunction. But this is not the practice (7).
- Injunction restrains all proceedings.** The plaintiff in a bill of interpleader moves at once for a notice of motion for a special injunction on the payment of money into court, without first obtaining the common injunction, as in other cases where actions at law are restrained (8). The injunction not only restrains execution, but also trial, and other proceedings (9).

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(1) 1 Smith Ch. Pr. (2nd Am. ed.) 474.

(2) 1 Smith Ch. Pr. (2nd Am. ed.) 474.

(3) 1 Smith Ch. Pr. (2nd Am. ed.) 474.

(4) *Langston v. Boylston*, 2 Ves. Jun. 101; *Dungey v. Angove*, 1 Ves. 313, Mr. Hovenden's note (2).

(5) 1 Smith Ch. Pr. (2nd Am. ed.) 474; *Walbanke v. Sparks*, 1 S. M. 1761.

(6) 3 Madd. 130.

(7) 1 Smith Ch. Pr. (2nd Am. ed.) 474, 475; *Dungey v. Angove*, 1 Ves. 313, Mr. Hovenden's note (2). See *Eden Injunct.* (2nd ed.) 401 to 403.

(8) *Vicary v. Widger*, 1 Sim. 15; *Warrington v. Wheatstone*, 1 Jac. 205.

(9) *Warrington v. Wheatstone*, 1 Jacob, 205.

In *Philling v. Edwards* (1), the injunction was granted, although the trial was coming on the next day (2). Defendants out of Jurisdiction.

A bill of this character will lie, although all but one of the defendants claiming the subject in controversy are out of the jurisdiction; otherwise, by fraudulently absenting themselves, they might prevent the other claimant from obtaining justice. If the answers of the absent defendants are not put in within a reasonable time a perpetual injunction will be awarded against them (3). In a case where the subject was a policy on a cargo lost, an injunction was granted in an interpleading suit to stay proceedings at law, although both defendants resided abroad (4). *A fortiori*, when a party has once appeared, he cannot, by subsequently absenting himself, prevent a decree (5). Some of defendants out of jurisdiction.  
Both defendants residing abroad.

And after an answer has been put in by one of the defendants, should there be any improper delay in getting in the answers of the others, that will afford a special ground, upon which the party, who has answered, may move to have the money paid out to him, if it has been brought into Court (6). Answers delayed.

If one of the defendants does not appear, the bill may be taken as confessed as to him (7). Bill taken as confessed.

Where a defendant suffers a bill to be taken as confessed against him, it is an admission, that, as to him, the bill was properly filed, and that he has made an improper claim against the fund (8). What it admits.

If one of the defendants is not personally served with process, being absent, and the bill is taken as confessed against him, the defendant who appears will not be entitled to the possession of the fund, until the expiration of the time limited by the statute for the other defendant to appear, unless he gives security to replace the fund, in case the other defendant appears and establishes his right to the same (9). One defendant not served with process.  
Fund.

(1) Cited 1 Smith Ch. Pr. (2nd Am. ed.) 475.

(2) 1 Smith Ch. Pr. (2nd Am. ed.) 475.

(3) *Martinus v. Helmuth*, Cooper, 248; *Stevenson v. Anderson*, 2 Ves. & Bea. 412; *Eden Injunct.* (2nd Am. ed.) 404, 405. See *Richards v. Salter*, 6 John. Ch. 445.

(4) *Martinus v. Helmuth*, Cooper, 245.

(5) *Farebrother v. Prattent*, 5 Price, 305.

(6) *Hyde v. Warren*, 19 Vesey, 323; *Dungey v. Angove*, 2 Sumner's Vesey, 313, Mr. Hovenden's note (4). See *Richards v. Salter*, 6 John. Ch. 445.

(7) *Farebrother v. Prattent*, 1 Daniel Rep. 64.

(8) *Badeau v. Rogers*, 2 Paige, 209.

(9) *Aymer v. Gault*, 2 Paige, 284.

Demurrer, Answer, Costs and Decree.

When demurrer proper.

Answers put in by defendants.

Plaintiff must reply and close proofs.

Plaintiff not entitled to his costs unless he sets down the cause for hearing.

Unless defendants admit facts and state no new ones.

Decree plaintiff seeks.

Amount or origin of fund not an inquiry for plaintiff.

Whenever the objection to a bill of this kind appears upon its face, advantage should be taken of it by demurrer. For if the defendants, instead of demurring, put in answers insisting, that the bill is improperly filed, they will only be allowed, upon the dismissal of the bill, the costs to which they would have been entitled upon the allowance of a demurrer (1).

The defendants may put in answers admitting or denying the facts stated in the bill. If the defendants, or either of them, deny the allegations in a bill of this nature, or set up distinct facts in bar of the suit, the plaintiff must reply to the answer, and close the proofs, in the usual manner, before he can bring his cause to a hearing (2).

Where the plaintiffs had replied to the answers, and served subpoenas to rejoin, it was held, that they could not move to have their costs paid out of the fund in Court, but must set down the cause for hearing (3).

But where the defendants admit the facts stated in the bill, and in which the right to file a bill of interpleader rests, and set up no new facts as against the plaintiff, or in bar of his suit, it seems to be sufficient for him to file a replication, and to set the cause down for a decree to interplead, without waiting till the proofs are taken as between the defendants (4).

A decree that a bill of interpleader is properly filed is the only decree, that the plaintiff is interested in obtaining (5).

The amount, or origin of the fund &c. is not the object of inquiry as against the plaintiff, except in reference to fraud or collusion on his part (6). But the amount and origin of the fund may be material, as between those called upon to interplead (7).

Where the decree goes on to order a reference to a Master by consent of parties, upon principles calculated to adjust the rights of those called upon to interplead, it will be considered a substitute for the ordinary proceeding by actual interpleader (8).

(1) *Shaw v. Coster*, 8 Paige, 339.

(2) *City Bank v. Bangs*, 2 Paige, 570; *Jones v. Gilham*, 1 Cooper, 49.

(3) *Jones v. Gilham*, 1 Cooper, 49; *Eden Injunct.* (2nd Am. ed.) 404.

(4) *City Bank v. Bangs*, 2 Paige, 570.

(5) *Story Eq. Pl.* § 297 (b); *Atkinson v. Manks*, 1 Cowen, 691.

(6) *Atkinson v. Manks*, 1 Cowen, 691.

(7) *Atkinson v. Manks*, 1 Cowen, 691.

(8) *Ib.*

bill is dismissed, there can be no further proceedings by  
as between the defendants, for the Court has no jurisdic-

Dismissal,  
Abatement,  
Proceedings.

decree in an interpleading suit may terminate the case as to  
plaintiff, though the litigation may continue between the de-  
fendants by interpleader, and in that case, the cause may proceed  
revivor, notwithstanding the death of the plaintiff (2).

Bill dismissed.  
No abatement  
by death of  
plaintiff after  
decree to in-  
terplead.  
Mode of pro-  
ceeding in the  
cause.

the Court of Equity dispose of questions arising upon bills of in-  
terpleader, in various modes according to the nature of the ques-  
tion, in the manner in which it is brought before the Court. An  
interpleading bill is considered as putting the defendants to con-  
front their respective claims just as a bill does, which is brought by  
a creditor or trustee to obtain the direction of the Court, upon  
opposing claims of different defendants. If therefore, at the  
first hearing the question between the defendants is ripe for a decision,  
the Court will decide it, and make a final decree at the first hearing.  
If it is not ripe for a decision as between the defendants,  
the Court merely decides that the bill is properly filed, and dis-  
misses the plaintiff with his costs up to that time, and directs an  
issue or an issue, or a reference to a Master, to ascertain con-  
facts, as may be best suited to the nature of the case (3).  
A decree or a direction to interplead *at law* would be obviously  
erroneous in all cases, except those where the titles on each side are  
equal. Equitable titles can only be disposed of by Courts  
of Equity; and even as to legal titles, it is obvious, that in many  
cases resort to an issue, or to an interpleader, to be had at law,  
is unnecessary, or inexpedient (4).

After answer by both defendants, one makes default at the  
first hearing, the Court will make a decree on hearing the case of the  
defendant who appears (5).

One defendant  
defaulted.

reference to the Master to settle the rights of the defend-  
ants in an interpleading suit as between themselves, the Court will  
grant the benefit of a discovery as against each other, if they, or  
any of them, desire it (6).

Discovery.

*Wiggins v. Nugent*, 1 Moll. 134.  
11 E. Pl. by Jeremy, 60, 49 note (n); *Anon.* 1 Vern. 351; *Jen-*  
*Nugent*, 1 Moll. 134.  
*Gell v. Hadden*, 16 Vesey, 202; *City Bank v. Bangs*, 2 Paige, 570;  
10 E. Jur. § 822; 1 Smith Ch. Pr. (2nd Am. ed.) 472; *Eden Injunct.*  
(ed.) 404.  
10 E. Jur. § 822.  
*Eden v. Smith*, 1 Cox, 357.  
*City Bank v. Bangs*, 2 Paige, 570.

Evidence,  
Costs, Lien.  
Answers of  
defendants  
may be read.

Two defendants may read the answers of each other at the hearing (1), and are allowed in costs for a copy of each other's answer (2).

It appears by the case of *Armiter v. Swanton*, as reported in 1 Ambler, 393, that in a bill by trustees in the nature of a bill of interpleader, the Court gave leave to one of the defendants to examine one of the plaintiffs as a witness (3).

But Mr. Blunt in a note to this case in his edition of Ambler seems to think, that there is a mistake in the report both as to the name of this case and as to the application and point decided (4).

Costs.  
Out of fund.

Where the plaintiff has brought a bill of interpleader, properly and in good faith, as against both the defendants (5), he will be entitled to his costs both in equity and at law, where he has been sued, out of the fund (6).

It is otherwise, where the bill is unnecessarily filed (7).

Lien on fund.

The plaintiff has a *lien* for his costs on the fund in Court, if there be such a fund; but, if there be no such fund, then costs will be given against the party, who occasioned the necessity for the suit. This was so held in a case, which, though not strictly one of interpleader, was in the nature of an interpleading bill (8).

Party in wrong  
must eventually  
pay them.

In the adjustment of the controversy between the defendants, the party, whose claim is adjudged groundless, will be compelled to pay the costs, which have been taken in the first instance from the fund, to the rightful claimant of the fund (9).

(1) 1 Smith Ch. Pr. (2nd Am. ed.) 475; *Bowyer v. Pritchard*, 11 Price, 103.

(2) *Ib.*

(3) See 1 Smith Ch. Pr. (2nd Am. ed.) 475.

(4) See 1 Blunt's Ambler, 393, note (1). As to the right of a defendant to examine a plaintiff as a witness in ordinary cases, see *ib.* note (2), and cases cited; ante, 1038, and notes.

(5) *Badeau v. Rogers*, 2 Paige, 209.

(6) *Richards v. Salter*, 6 John. Ch. 445; *Canfield v. Sterling*, 1 Hopk. 224; *Aymar v. Gault*, 2 Paige, 284; *Spring v. S. Carolina Ins. Co.* 8 Wheat. 268; *Mason v. Hamilton*, 5 Sim. 19; *Atkinson v. Manks*, 1 Cowen, 691; *Campbell v. Solomons*, 1 Sim. & Stu. 462; *Thompson v. Ebbets*, 1 Hopk. 272; *Paris v. Gilham*, 1 Cooper, 56; *Aldridge v. Mesner*, 6 Vesey, 418; *Aldridge v. Thompson*, 2 Bro. C. C. (Perkins's ed.) 150, and note (a).

(7) *Bedell v. Hoffman*, 2 Paige, 199; *Badeau v. Rogers*, *ib.* 209; *Shaw v. Coster*, 8 Paige, 339.

(8) *Aldridge v. Mesner*, 6 Sumner's Vesey, 418, 419. See *Dunlop v. Hubbard*, 19 *ib.* 205, Mr. Hovenden's note; *Eden Injunct.* (2nd Am. ed.) 406.

(9) *Thomson v. Ebbets*, 1 Hopk. 272; *Canfield v. Sterling*, *ib.* 224; *Mason v. Hamilton*, 5 Sim. 19; *Badeau v. Rogers*, 2 Paige, 209; *Aldridge v. Mesner*, 6 Vesey, 418; *Dowson v. Hardcastle*, 1 Sumner's Vesey, 368, 369; *S. C.* 2 Cox, 278; *Cowtan v. Williams*, 9 Vesey, 107.

may be given as between the defendants to an interpleader (1). Costs and Interpleader at Law.

direction in that case is, that the plaintiff shall be at liberty to pay his costs out of the fund; to pay the remainder to the defendant in favor of whom the decree is made; and that the unsuccessful defendant should pay to the other defendant what should be retained by the plaintiff, and the costs of that defendant (2).

may be given to a defendant in a suit, which, though not one of interpleader, was in the nature of an interpleading Costs between defendants.

one of the defendants suffers the bill to be taken as confessed against him, he will be personally charged with all the costs, which accrued in consequence of his unjust claim upon the fund (4). In special circumstances the defendants will be allowed their costs respectively out of the fund (5).

defendants, in a proper case for demurring, put in an answer, insisting, that the bill is improperly filed, they will be allowed the dismissal of the bill, only the costs, to which they would be entitled, upon the allowance of a demurrer (6).

costs are generally given as between party and party (7). How taxed.

In *Dungey v. Angove* (8), which was a case of fraudulent conveyance, the plaintiff and his solicitor were ordered to pay the costs of a bill of interpleader, which was dismissed, *all* his costs as between attorney and client. In case of fraud.

Remedy by bill of interpleader, although it has cured many cases of hardship in proceedings at law, has yet left many cases of hardship undressed for. No attempt appears to have been made in America to remedy these grievances. But in England, by 1 & 2 Will. 4, c. 4, a far more expanded reach has been given to the remedy of interpleader in the Courts of Law, and its benefits have been Remedy for cases of hardship by interpleader at law in England.

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*Swan v. Williams*, 9 Sumner's Vesey, 107, 108; *Brymer v. Buchan*, 1 ib.; *Dowson v. Hardcastle*, 2 Cox, 279; S. C. 1 Sumner's Vesey, 405, 406, and note. *See* Injunct. (2nd Am. ed.) 405, 406, and note.

*Hubbard v. Hubbard*, 19 Sumner's Vesey, 205.

*Deau v. Rogers*, 2 Paige, 209.

*Kinson v. Manks*, 1 Cowen, 691.

*Law v. Coster*, 8 Paige, 339.

*Hubbard v. Hubbard*, 19 Vesey, 205; *Dowson v. Hardcastle*, 2 Cox,

*Vesey*, Jun. 313.



Bill in Nature of a Bill of Interpleader. extended to many cases of honest, but unavoidably doubtful litigation (1).

Not effected jurisdiction in Equity. The jurisdiction in Equity seems, however, to have been left substantially upon its old foundations (2).

Bill in the nature of a bill of interpleader, when it lies. Although a bill of interpleader, strictly so called, lies only, where the party applying claims no interest in the subject-matter; yet there are many cases, where a bill in the nature of a bill of interpleader, will lie by a party in interest, to ascertain and establish his own rights, where there are other conflicting rights between third persons. As, for instance, if a plaintiff is entitled to equitable relief against the owner of property, and the legal title thereto is in dispute between two or more persons, so that he cannot ascertain to which it actually belongs, he may file a bill against the several claimants in the nature of a bill of interpleader for relief (3).

In such cases the plaintiff seeks relief for himself, whereas in an interpleading bill strictly so called, the plaintiff only asks, that he may be at liberty to pay the money, or deliver the property to the party, to whom it of right belongs, and may, thereafter, be protected against the claims of both (4).

Case where one defendant claims of plaintiff more than plaintiff admits to be due. Where one of the defendants in a bill of interpleader in his answer makes a claim against the plaintiff beyond the amount admitted to be due and paid into Court, and which is not claimed by the other defendants, he will be permitted to proceed at law to establish his right to that part of his demand, which is not in controversy with the other defendants (5).

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(1) 1 Smith Ch. Pr. (2nd Am. ed.) 476; 2 Story Eq. Jur. § 823.

(2) 2 Story Eq. Jur. § 823.

(3) *Mohawk and Hud. R. R. Co. v. Clute*, 4 Paige, 384; *Thomson v. Ebbets*, 1 Hopk. 272; *Parks v. Jackson*, 11 Wendell, 443; *Bedell v. Hoffman*, 2 Paige, 199; *Mitchell v. Hayne*, 2 Sim. & Stu. 63; *Goodrich v. Shotbolt*, Prec. Ch. 333 to 336; *City Bank v. Bangs*, 2 Paige, 570; *Fowler v. Lee*, 10 Gill & John. 358.

(4) 2 Story Eq. Jur. § 824; Story Eq. Pl. § 297 b.

(5) *City Bank v. Bangs*, 2 Paige, 570.

## CHAPTER XXXIII.

## OF AFFIDAVITS.

in pursuance of the original arrangement of the present General na-  
 conducted the reader through a suit in Chancery in all ture of affida-  
 y stages, from the bill to the final decree, and having vits.  
 as attention to the practice arising in consequence of  
 mental occurrences by which a suit may become defec-  
 ted, the author proposes now, in further prosecution of  
 to direct the practitioner's attention to those applications  
 y be made to the Court in the progress of a cause for  
 se of obtaining from it orders not immediately necessary  
 ular progress of the suit, but for which a necessity arises  
 e collateral matter consequent upon the pleadings or  
 other circumstances of the case. Applications of this  
 usually termed interlocutory applications, and the in-  
 of the rules which govern the Court in granting them,  
 the subject of some of the following chapters: but it  
 happens that applications of this nature are supported  
 e, not elicited by interrogatories in the ordinary man-  
 ing evidence in the Court, but offered to the Court in  
 of a written declaration, either by a party making the  
 n, or a stranger, (which form of evidence has frequently  
 ded to in the present Treatise;) the writer conceives  
 e he enters into the consideration of interlocutory ap-  
 in general, it will not be considered out of its place  
 e devotes a few pages to the discussion of the rules by  
 practice relating to affidavits is regulated.

avit then is a declaration upon oath or affirmation (p) (1), Before whom  
 sworn.

erson professing to be a to persons who, having been Quakers  
 Moravian may make affi- or Moravians, have ceased to belong  
 solemn affirmation, vide to such sects, but continue to have  
 III. c. 34; 3 & 4 Will. conscientious objections to the tak-  
 which privilege has since ing of an oath.  
 led by 1 & 2 Vict. c. 77,

re the affidavit is an affirmation, and the person taking it does not

**When before  
Masters ex-  
traordinary.**

**Not before a  
solicitor in the  
cause ;**

(g) Hind. 451.

(1) In *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, it was an affidavit in Chancery, not sworn before a judge of the Court, missioner appointed to administer an oath, could not be received in. An affidavit in New York may be sworn to before a state senator

e affidavit is sworn, must not be a solicitor in the cause (1), Before whom  
Sworn.  
 , in a case before Lord Hardwicke, where the affidavits,  
 rt of a petition, had been sworn before the petitioner's  
 , the petition was dismissed and the costs were directed to  
 t of the solicitor's pocket (t). And in the case of Wood  
 r (u), Lord Langdale, M. R., rejected affidavits, because  
 l been sworn before a Master extraordinary, who acted as  
 the plaintiff's attorney.

by stat. 1 Will. IV. c. 36, s. 15, rule 20, it is provided, When depo-  
nent in a pris-  
on in London.  
 in order to relieve persons in prison from the expense of a  
 s attendance to take affidavits or answers, the Lord High  
 for shall, by one or more commission or commissions un-  
 Great Seal, under or in respect of which no fee shall be  
 nominate and appoint the warden or keeper or other  
 fier of any prison or prisons within the City of London  
 ills of mortality, and their deputies, to be Master extraor-  
 of the High Court of Chancery, for the purpose of taking  
 iving such affidavits and answers as any person or persons  
 such prison or prisons shall be willing or desirous to make  
 no other purpose"; and it is further provided, "That he  
 o taking such affidavit or answer, shall, in respect thereof,  
 ed to receive a fee of one shilling and no more."

wer, the Court of Chancery is in the habit of receiving When out of  
the jurisdic-  
tion.  
 made by parties resident out of the jurisdiction, though  
 ily not sworn to before any of those functionaries, provid-  
 shown that the persons before whom they are sworn are  
 who, by the law of the country in which the affidavit is  
 re authorized to administer an oath (2); thus an affida-  
 re Hogan, 3 Atk. 812. (u) 3 Beav. 290.

t this rule is confined in New York to the solicitor on record. An  
 may be sworn to before any proper officer, although he is counsel  
 of the parties, or is a partner of the solicitor in the cause. The Peo-  
 alding, 2 Paige, 326.

vision of the Revised Statutes of New York, prohibiting a Master  
 ng as such in a cause, in which he is counsel, does not extend to  
 taking of an affidavit. Ib.; M'Laren v. Charrier, 5 Paige, 530.

affidavit taken before a Master of the Court of Chancery in New-  
 a place out of the State, will not be allowed to be read in that  
 he Master has no authority to take an affidavit out of the State.  
 v. Maris, Halst. Dig. 173.

affidavit sworn to before a Master in Chancery in another State,  
 not a commissioner appointed by the State where the affidavit was  
 as held regular in Allen v. State Bank, 1 Dev. & Bat. 7.

ry v. Kirk, 9 Dana, 267, an affidavit made out of the State was  
 admissible.

Before whom  
Sworn.  
In Scotland,

— may be  
before a jus-  
tice of the  
peace.

Terms upon  
which Court  
will receive  
affidavits  
sworn abroad.

vit sworn before a Master in ordinary or a Master extraordinary of the Court of Chancery in Ireland has been permitted to be read in this Court (*u*). So, also, has an affidavit sworn before a Baron of the Exchequer in Scotland (*x*). It should be mentioned here, that in *Hyde v. Whitfield* (*y*), Lord Eldon is reported to have said, that although the Courts have, of late, acted upon affidavits made before the superior Courts in Scotland, he did not recollect an instance of the Court taking notice of an affidavit sworn before a Justice of the Peace in Scotland. It appears, however, that his Lordship's memory in that case was not quite accurate, for, in *Pinkerton v. The Barnsley Canal Company* (*z*), he made an order, upon an application which was opposed, that the Master should, in a matter pending before him, be at liberty to receive an affidavit sworn before a Justice of the Peace in Scotland, upon its being verified to the satisfaction of the said Master that the person before whom the affidavit purported to have been made was, according to the laws of Scotland, qualified to administer an oath, and upon the signature of such person to the jurat of the affidavit being verified (1). Upon the authority of this case Lord Chief Baron Alexander permitted an affidavit, sworn by defendant before a magistrate in Scotland, to be read upon a motion in the Court of Exchequer, and it may be assumed that the Court of Chancery would be guided by the same precedent (*a*).

The directions contained in Lord Eldon's order in *Pinkerton v. The Barnsley Canal Company* (*b*), point out very clearly the terms upon which the Court will receive an affidavit sworn out of the jurisdiction of the Court, viz., *that it should be shown that the person before whom the affidavit purports to have been sworn, is, according to the law of the country in which it is sworn, qualified to administer an oath, and that the signature of such person should be properly verified.*

Upon this principle the Court acted in *Chicot v. Lequesne* (*c*), in which it ordered an affidavit as to the production of books by a party resident in Holland, to be sworn before a notary public at

(*u*) *Sergison v. Sergison*, cited 1 J. & W. 296; and *Annesley v. Earl of Anglesey*, 1 Dick. 90.

(*z*) *Braham v. Bowes*, 1 J. & W. 296.

(*y*) 19 Ves. 344.

(*z*) 3 Y. & J. 277, *notis.*

(*a*) *Ellis v. Sinclair*, 3 Y. & J. 273.

(*b*) *Ubi supra.*

(*c*) 1 Dick. 150.

(1) See *Ramy v. Kirk*, 9 Dana, 267, as to an affidavit sworn to before a Justice of the Peace of another State.

Amsterdam, with the intervention of a proper magistrate, if necessary by the law of Holland, to the administration of the oath. Before whom Sworn.

The object in requiring the affidavit, in the above case, to be sworn before a notary public, was to enable the notary to verify the transaction under his official seal (*d*), "for, as by the law of nations a notary public has credit every where, the Court will give credit to him" (*e*). Certificate of notary public.

It is, however, to be observed that although the Court will, in cases of this description, give credit to the fact, as certified under the notarial seal of a notary public, it will require some evidence that the person, whose seal is affixed, actually fills the character he assumes; this may be effected either by the production of an affidavit by some person resident in this country who can depose to the fact of his being a notary public, or by the certificate of some public officer of the country in which the transaction took place, competent to give such certificate (*f*), which certificate must, however, be verified by the affidavit of some person resident here, conusant of the fact that the public officer who certifies is what he assumes to be (*g*). Must be supported by evidence that he is a notary.

Thus, where a certificate that an affidavit was sworn before a magistrate in Prince of Wales's Island, in the East Indies, was signed and sealed by the magistrate himself and by a notary public, the Lord Chancellor thought the evidence not sufficient; observing that, although a notary public by the law of nations has credit every where, and the Court, therefore, will give credit to him, yet it was necessary to prove that the other person was a magistrate (*h*). Where sworn before a magistrate. Identity of magistrate must be proved.

So also, where an affidavit purported to be sworn before the mayor of Georgetown, in Columbia, in the United States, whose signature and seal were affixed, Sir T. Plumer, M. R., held, that although the affidavit purported to have been sworn before a person calling himself mayor, &c., there was no evidence to show who he was, and that something further was necessary to verify it (*i*).

(*d*) Vide Sir J. Walrond v. Jacob, 12 Vin. Ab. Ev. p. 123; A. b. 51, pl. 2, 8 Mod. 323; where the Court held that a plaintiff who was in Holland might make affidavit there, and get it attested by a notary public, and that it should be admitted as evidence to hold the defendant to special bail.

(*e*) Hutcheon v. Mannington, 6 Ves. 823. The Court will also admit the certificate of a notary, under

his seal, in proof of the execution abroad of a power of attorney to receive money from the Accountant-general.

(*f*) Vide Lord Kinnaird v. Lady Saltoun, 1 Mad. 227.

(*g*) Garvey v. Hibbert, 1 J. & W. 180.

(*h*) Hutcheon v. Mannington, ubi supra.

(*i*) Garvey v. Hibbert, ubi supra.

- Before whom Sworn. It is to be observed that, by the 6 Geo. IV. c. 87, s. 20, every *Consul-general* or *Consul* appointed by the sovereign of this country, at any foreign port or place, is authorized and empowered *whenever he shall be thereunto required and whenever he shall deem it necessary*, to administer at such foreign port or place, any oath, or take any affidavit or affirmation from any person or persons whomsoever, and also to do and perform, at such foreign port or place, all and every notarial acts or act which any notary public could or might be required to do within the United Kingdom of Great Britain and Ireland; and it is enacted, that every such oath, affidavit, or affirmation, and every such notarial act, administered sworn, affirmed, had, or done by or before such *Consul-general* or *Consul*, shall be as good, valid, and effectual, and shall be of like force and effect to all intents and purposes, as if any such oath, affidavit or affirmation, or notarial act respectively, had been administered, sworn, affirmed, had, or done, before any Justice of the Peace or notary public in any part of the United Kingdom of Great Britain and Ireland, *or before any other legal or competent authority of the like nature*. Under this Act, therefore, affidavits sworn before any *Consul-general* or *Consul* of her Majesty, resident at any port or other place abroad, may be received as evidence in the Court of Chancery, upon producing evidence to prove the signature of such *Consul-general* or *Consul* to the jury and that the person signing the same is such *Consul-general* or *Consul*; an affidavit of which fact may, in general, be procured from some of the clerks in the Foreign Office.
- Where sworn in a colony must be under the seal of the colony. It is said that an affidavit from the plantations cannot be read in this Court, unless under the seal of the island (*k*), which seal must, also, be verified by the affidavit of some person here who knows the seal to be that of the colony.
- Where sworn in the East Indies. Where an affidavit purported to have been sworn before a magistrate in India, proof was admitted, from the proceedings in the India House, to show that the person before whom it was sworn was a magistrate (*l*).

Form of. An affidavit must be correctly entitled in the cause or matter in which it is made; for an affidavit made in one cause, cannot be read, to obtain an order in another (*m*); it will, however, be sufficient

(*k*) *Annesley v. Earl of Anglesey*, Ves. 823.  
 1 Dick. 90. (*m*) *Lumbrozo v. White*, 4 Dick.  
 (*l*) *Hutcheon v. Mannington*, 6 150.

ficient if it was correctly entitled when it was sworn, although the title of the cause may have been subsequently altered by amendment; thus, where, at the time an affidavit was made, there were three defendants in the cause, and the affidavit was entitled in the cause accordingly, and afterwards the plaintiff amended his bill by striking out the name of one of the defendants, and then moved for and obtained an injunction on the affidavit as it was originally entitled, upon a motion to discharge the order for the injunction, on the ground that the affidavit on which it was obtained was improperly intitled, the V. C. of England refused the motion with costs (a) (1).

Form of.  
Title.

In all affidavits the true place of residence, description, and addition of every person swearing the same must be inserted (o). This rule, however, will not apply to affidavits by parties in the cause, who may describe themselves, in the affidavit, as the above-named plaintiff, or defendant, without specifying any residence or addition or other description: and even where a plaintiff so described himself in an affidavit, and it appeared, upon inspecting the office copy of the bill, that no addition had been given to him in the bill, the affidavit was considered sufficient (p). In that case, also, there were several plaintiffs, and the plaintiff making the affidavit described himself as "the above-named plaintiff," whereas, it was objected, that he ought to have called himself "one of the above plaintiffs," but the objection was overruled (q).

Names and description of deponents.

With respect to the form of affidavits, the 126th Order of May, 1845, directs, that "All affidavits are to be taken or expressed in the first person of the deponent."

Must be expressed in first person.

The 127th of the same Orders directs, that "All copies of affidavits are to be ready for delivery within forty-eight hours after the same are bespoke."

By the 128th Order, "Any solicitor, party, or person, filing an affidavit, not taken or expressed in the first person of the deponent,

- (a) *Hawes v. Bamford*, 9 Sim. 653. (p) *Crockett v. Bishton*, 2 Mad. 446.  
(o) *Hind*. 451; *Prac. Reg.* 9. (q) *Ibid*.

(1) Although, in ordinary cases, the Court will disregard the misentitling of a paper, which could not have misled the opposite party, it is otherwise as respects affidavits; because the misentitling of an affidavit will exempt the defendant from the punishment of perjury, although his oath is false. *Hawley v. Donnelly*, 8 Paige, 415. See *Stafford v. Brown*, 4 Paige, 360.

Where there are several defendants, and there is but one suit pending between the plaintiff and the defendant first named therein with others, it is sufficient in the entitling of an affidavit, to entitle it in the name of the plaintiff against the first defendant and others, without setting forth the names of all the defendants at length. *White v. Hess*, 8 Paige, 544.



- Form of.** is not to be allowed the costs of preparing and filing such affidavit taxation of costs."
- The affidavit must commence by stating, that the party "*make oath and saith, &c.*," for even though the *jurat* express that the party was sworn, it will not be sufficient unless the affidavit state that the party maketh oath (r).
- Where the deponent is a marksman, the *jurat* will be :—
- Form of jurat.** *Sworn, &c., the whole of the above affidavit having been for read over and explained to the said A. B., who appeared perfectly to understand the same, he made his mark in my presence.*
- Where a marksman signed an affidavit with his name at length his hand having been guided on the occasion, the V. C. of England ordered it to be taken off the file (s).
- Substance of.** An affidavit must be true in substance, with all necessary circumstances of time, place, manner, and other material incidents (t) (1); it must also be sufficient to sustain the case on by the motion or petition of which it is the ground-work (u).
- In affidavits of service.** It is to be observed, particularly, that every affidavit of service of writs, or of orders, upon which process of contempt is to be founded, must truly and fully prove good service; and that if plaintiff's name, the Court, the return of the writ, or any thing material, be omitted, no attachment can be thereupon regularly sued; for, until a due service be shown, no contempt appears to the Court (x).
- Scandal or impertinence in. Reference for.** An affidavit must also be *pertinent and material*, without needless tautology and impertinent matter or other prolixities (y) (Scandalous and irrelevant matter should be carefully avoided, and if any such are inserted, they may be expunged by the same p

(r) Phillips v. Prentice, 2 Hare, 642. words spoken, the addition of "*so that effect*," is a proper precaution.

(s) — v. Christopher, 10 Sim. 409. Aycliffe v. Murray, 2 Atk. 60.

(t) For the form of the *jurat* upon other occasions, see ante, p. 854. (u) Hind. 451.

(x) Ibid. 453.

(y) Ibid.

(1) An affidavit that the defendant has a good defence, without stating nature and substance of it, is not sufficient. See *Ins. Co. v. Stebbins* Paige, 563. It is not the practice to receive a general affidavit of merits. The party must state upon oath what such merits are, to enable the Court to see whether they are not merely imaginary; and in order that the defendant may be liable to punishment for perjury if his affidavit is false. See *Meach v. Chappell*, 8 Paige, 135.

(2) See *Meach v. Chappell*, 8 Paige, 135.

cess as scandal or impertinence in a bill or other pleading (z) (1). We have seen, moreover, that the Court is now enabled, by the 122nd Order of May, 1845 (a), at once to declare an affidavit to be of improper length, or to refer it to the Taxing Master.

Form of

If the party complaining of scandal or impertinence in an affidavit, proceeds by reference, he must, as we have seen, take exceptions in writing (b); and care must then be taken that he do not file affidavits in opposition to such parts of the officer's affidavits as he has excepted to, lest it may be construed as a waiver of the exceptions (c). Pending a reference for impertinence the affidavits cannot be used, though the Court, if necessary, may put the party upon terms (d).

How waive

It may be mentioned here, that, where a whole petition was recited in an affidavit of service, the costs were ordered out of the solicitor's pocket (e) (2).

Solicitor may be ordered to pay costs of impertinence

Affidavits ought to be fairly written in one hand, without blots or interlineations of any words of substance, otherwise the Master may refuse to accept them; or if he does accept them, the Clerk of Affidavits may refuse to file them (e). Where, however, small blots or interlineations happen, the Master usually marks them, in the margin, with his initials (f).

Must be fairly written.

The time for swearing affidavits, at the public office, is between the hours of ten in the morning, and two in the afternoon, and six and eight in the afternoon. They may be sworn at a Master's chambers or private house, at any time. If sworn before a Master

Time of swearing at public office.

At Master's chambers or house.

(z) For the course of proceeding upon scandal and impertinence in a bill, vide ante, p. 397-8. It is to be observed, that this course of proceeding applies only to scandal or impertinence in affidavits to be used in Court; where they are to be used before a Master a different course of proceeding to get the scandal or im-

pertinence expunged must be adopted, vide ante, p. 1397.

(a) Ante, p. 406.

(b) Ante, p. 1144.

(c) Bickford v. Skewes, 8 Sim. 206.

(d) Pearse v. Brook, 3 Beav. 337.

(e) Ex parte Smith, 1 Atk. 139.

(f) Hind. 451.

(g) Ibid.; et vide Beames's Ord.

148.

(1) It is competent for the Court, upon the mere examination of an affidavit or other paper read before it, on a motion, to order scandalous or impertinent matter contained in it to be expunged without reference to a Master, and to charge the proper party with the costs. Powell v. Kane, 5 Paige, 265.

A party who makes an affidavit to oppose a motion, is only authorized to state the facts; and it is scandalous and impertinent to draw inferences or state arguments in the affidavit, reflecting on the character or impeaching the motives of the adverse party or his solicitor. Powell v. Kane, 5 Paige, 265.

(2) If a solicitor is compelled to pay the costs of expunging scandalous or impertinent matter, he has no legal or equitable claim upon his client to refund the amount. Powell v. Kane, 5 Paige, 265.

Form of. extraordinary in the country, the Master must, at the foot, express the name of the town and county where it is taken, otherwise it will not be filed (*g*).

Signature to. The party swearing the affidavit must subscribe his Christian name and surname on the left hand thereof. The *jurat* is written on the right. Any irregularity, in the form of the affidavit or of the *jurat*, will be a ground for the Court refusing to have it read (*h*) (1).

Filing of. It is directed, by various Orders of the Court, and is the invariable rule of practice, "That all affidavits of this Court, (excepting those only which belong to the Supplicavit Office,) shall, before the same be exhibited in Court, or otherwise produced to ground any order, writ, process, or proceeding of Court thereupon, be brought into the office for registering affidavits, and be there duly filed and kept (2), and that neither the Registrar of the Court, his clerks, or deputies, shall or do, at any time, draw up, sign, or set his or their hand or hands unto any order whatsoever grounded on any affidavit, unless such affidavit be first filed and registered with the Registrar of Affidavits (*i*), and attestation brought and showed to the said Registrar of this Court, under the hand of the said Registrar of Affidavits, or his deputy attending the said office" (*k*).

Office copies should be in Court. No affidavit ought to be used in Court unless an office copy of it has been first obtained; and in the case of *Jackson v. Cassidy* (2), the V. C. of England dissolved a special injunction with costs because office copies of the affidavits in support of it had not been obtained when it was moved for.

Which are given by Clerk of Affidavits. This Order is now acted upon by the Court in all cases where affidavits are to be used in Court (*m*), in which case every affidavit must be filed with the Clerk of Affidavits, who will, upon the

(*g*) Hind. 452; et vide Beames's Ord. 148.

(*h*) Ibid. As to the form of the *jurat*, vide ante, p. 854.

(*i*) Now the Clerk of Affidavits.

(*k*) Beames's Order, 148.

(*l*) 10 Sim. 326.

(*m*) Hind. 452; Prac. Reg. 8; Curs. Can. 419; Har. (ed. Newland), 400. The Order will not apply to affidavits that accompany bills, which must be filed with the bill, and constitute part of the record, vide p. 49. 50.

(1) If the deponent is blind, the officer should certify in the *jurat*, that the affidavit was carefully and correctly read over to him, in the presence of such officer, before he swore to the same. *Matter of Christie*, 5 Paige, 242. So where the affiant has been found by the inquisition of a jury to be a lunatic, the officer before whom the affidavit is sworn, should state in the *jurat*, that he has examined the deponent for the purpose of ascertaining the state of his mind, and that he was apparently of sound mind, and capable of understanding nature and contents of the affidavit. *Matter of Christie*, 5 Paige, 242.

(2) See *Bloodgood v. Clark*, 4 Paige, 574, 576.

ing filed, give an attested copy under his hand and stamp  
to be read in Court. Sometimes, (when expedition is  
l,) the solicitor filing the affidavit, instead of waiting for  
a copy by the Clerk of Affidavits, takes a copy of the affi-  
the office at the same time that he takes the original affida-  
filed, and then the clerk of affidavits marks the copy as  
a copy at the same time that he files the original (n).

Filing of.

to be observed, that it is only where affidavits are to be  
se of in Court that they are required to be filed; where  
a to be used *before a Master*, they are not filed in the  
t office, but are left in the Master's office, from which, if  
a afterwards required in Court, they must be brought by  
ster's clerk, in whose custody they are. In the case, how-  
f *Stubbs v. Sargon* (o), Lord Langdale, M. R., said, that  
r might be the custom, he thought the Masters ought not  
reports on affidavits which have not been previously regu-  
ed.

Not necessary  
where affidavit  
is to be used  
in Master's  
office.

have seen that by the 65th Order of 1828 (p), "All affida- Affidavits  
ich have been previously made and read in Court, upon filed in Court  
ceeding in a cause or matter, may be used before the may be used  
before Master,  
"

converse of this rule, however, has not been adopted, and but not *vice*  
s left with the Master can only be read in Court up- *versa*.  
ptions or appeals from the Master's determination, and not  
l any new order or process of the Court (q).

a is no particular time appointed for affidavits before ap- Time for filing.  
ns are made to the Court, but all affidavits made to ground  
n, must be filed time enough, before such motion is made,  
le the adverse party to obtain a copy of it; if not, the mo-  
petition which the affidavit is to support, must stand over  
is, however, will not apply to affidavits which cannot, ac-  
to the practice of the Court, be answered, as in the case  
fidavit to extend an injunction to stay trial (s).

nd. 452.

leav. 497.

ite, p. 1381.

e order as to filing affida-  
the clerks of affidavits, ap-  
r to affidavits to be used in  
rising out of suits or sum-  
lications to the Court as a  
Equity; all affidavits be-  
o the *Supplicavit* office and  
r bag office, and all those

touching lunatics and bankrupts, are  
to be filed in the several offices where  
such matters are transacted, Hind.  
452.

(r) Hind. 252. As to the time in  
which a copy may be obtained, see  
127th Order of May, 1845, ante, p.  
1775. For the time of affidavits ac-  
companying bills, see p. 451-2.

(s) *Jones v. —*, 8 Ves. 46.

out is need be-  
fore, special  
notice of read-  
ing must be  
given.

Where ordered  
to be filed by  
a certain day.

A party, however, is not bound to search for answers back than the date of the notice; if, therefore, an affidavit in the cause and filed on a former occasion, is introduced upon the motion, notice of such intention should either in the original notice of motion, or by separate writing, duly served.

It is laid down, that where the Court directs that affidavits be filed on both sides, by a certain day, and some of them on one side happen not to be filed on that day, it is the rule of the Court not to enlarge the order further, in the other side may be enabled to give an answer to the affidavits (u).

(c) Bowdler v. Bowdler, 4 Law 401; but the affidavits  
Jur. N. S. Chancery, 345. not be read.  
(u) Burton v. Maloon, Barnard,

## CHAPTER XXXIV.

### OF INTERLOCUTORY APPLICATIONS.

#### SECTION I. — General Nature of.

AN *interlocutory* application is a request made to the Court, <sup>What is an interlocutory application.</sup> either orally or in writing, for its interference in a matter arising in the progress of the cause, whether before it has been brought to a hearing, or afterwards, in consequence of a decree or order made upon such hearing ; and it may either relate to the process of the Court, or to the protection of the property in litigation *pendente lite*, or to any matter upon which the interference of the Court is required before or in consequence of a decree or decreal order.

Interlocutory applications are extremely various, and the occasions upon which they may be made are too numerous to be discussed in a general treatise of this nature : all, therefore, that can now be done is, to direct the reader's attention to some of the most important and frequent occasions upon which such interlocutory applications may be made, and to point out the course of practice upon each. This will be the object of some of the succeeding chapters of this work ; but before he proceeds to the accomplishment of it, the Author conceives that it will be useful to the practitioner to lay before him some of the general rules by which such applications are governed. <sup>Upon what occasion made.</sup>

Applications of this nature, when made *viva voce* to the Court, are called *motions* ; when they are made in writing, they are called *petitions* ; there does not, however, appear to be any very distinct line of demarcation between the cases in which they should be made by motion, and those in which they should be made by petition, the practice in this respect being generally regulated by the circumstances of each case (a) (1). <sup>Distinction between motions and petitions.</sup>

(a) This applies only to applications in a cause where the application is made on behalf of infants, or under the statutory jurisdiction it must be by petition, unless otherwise directed by the Statute under which the application is made.

(1) But where the application is upon some collateral matter, which has

Distinction between Motions and Petitions.

What may be done by motion.

The Orders of the Court have, however, pointed out certain matters which shall not be granted upon petition, and the general practice with regard to others has concurred, in some cases, in limiting the application to that method: thus—“It is ordered that no injunction for stay of suit at Law shall be granted, revived, dissolved, or stayed upon petition (b); nor any injunction, of any other nature, shall pass by order upon petition, without notice, and a copy of the petition first given to the other side, and the petition filed with the Registrar, and the order entered; and that no separation, dismissal, retainer upon dismissal, or final orders, are to be granted upon petition” (c). It is, however, directed by the 33rd Order of 1838, “that the order nisi for dissolving the common injunction may be obtained upon petition, as well as by motion, and that every such order be served two clear days at least before the day upon which cause is to be shown against dissolving the injunction.”

— by petition.

And now, we shall hereafter see that by the 58th Order of May, 1845, an injunction may be obtained upon petition of course, as well as upon notice (d).

Although it is competent to the Court to order money in Court to be paid out, upon motion, Lord Eldon, it is said, would not allow it to be done, as the general recitals in a petition, which must be justified by the proceedings to warrant the drawing up of the order, would always speak for themselves, at any distance of time; in conformity with this, the practice, except in particular cases, is not to make such order unless upon petition (e). In like manner, all applications for orders, which partake more of the nature of decrees or of decretal orders than of interlocutory proceedings, such for instance as applications for the appointment of guardians, and for the allowance of maintenance, for infants, should be made by petition; and so, in general, must all applications to the Court, upon matters arising out of decrees or decretal

(b) Beames's Orders, 12, 35, 214.  
And when an application is made to one of the Judges for a special injunction upon certificate of bill filed, when the Court is not sitting, it may be made by petition. Vide post, Ch. XXXV. sect. 3.

(c) Beames's Order, 214.

(d) Post, p. 1471.

(e) Vide Lord Shipbrooke v. Lord Hinchinbrooke, 13 Ves. 394; Gerratt v. Niblock, 5 Beav. 143.

reference to a suit in Court, a party may be relieved upon petition. Colwise v. Gelston, 10 John. 508.

A petition is the proper course to obtain a reversal of an interlocutory decree, wrongfully made, the cause yet pending. It cannot be done on motion, or bill of review. Wilcox v. M'Lane, 2 Hayw. 175.

orders, except those relating to the process of the Court or for enforcing the performance of them, which are usually made upon motion (1). Distinction between Motion and Petition

In *Lord Shipbrooke v. Lord Hinchinbrooke* (f), Lord Erskine, says — “ I do not find that there are any precise or positive boundaries between motions and petitions, as they are to be applied to carry into effect decrees and orders, so as to exclude all discretion in the Court to grant or refuse them, according to circumstances: but generally speaking, motions, which have for their object the giving effect to decrees or orders, should be confined to cases where the order which is to be made upon the motion, arises out of recent proceedings upon which there is no doubt; for as the adverse party knows nothing but by the notice, containing only the name of the cause and what is prayed of the Court, the proceedings ought to be recent and notorious, so as that the adverse party may be supposed to be perfectly conversant of all the steps and proceedings in the cause, as much as if, at a greater expense, they were recited in the petition.”

The Orders of the 5th May, 1837, provide for the separation of cases to be heard by the Master of the Rolls, from those to be heard by the Lord Chancellor or one of the Vice-Chancellors, and the 9th of these Orders directs, “ That all interlocutory applications by way of motion or petition (other than applications for orders of course) shall, in the several cases after mentioned, be made to the Lord Chancellor, or to a Vice Chancellor, and shall not, without special order of the Lord Chancellor, be made to the Master of the Rolls, viz., in the several cases following:—1st, where the original information or bill is marked with the words ‘ Lord Chancellor;’ 2nd, where the cause has not been set down for hearing, and any order disposing of any plea or demurrer or any special order upon merits, shown by answer or by affidavit, has been made in the cause by the Lord Chancellor or Vice-Chancellor, and no such order has been made by the Master of the Rolls; 3rd, where the cause has

Before what Judge.  
What interlocutory applications must be heard by the Lord Chancellor, or one of the Vice-Chancellors, and not by the Master of the Rolls.

(f) 13 Ves. 393.

(1) Where an order to stay proceedings in a cause pending in this Court is proper, the party must apply to the Court by petition. *Dyckman v. Kernochan*, 3 Paige, 26. And maintenance will be allowed to an infant, out of the capital of his estate, upon petition without bill. *Matter of Bostwick*, 4 John. Ch. 102.

A petition is the proper process to affect a fund in Equity, when no other parties are to be brought in to litigate the questions presented by it than such as are or ought to have been parties to the original bill. *Hays v. Miles*, 9 Gill & John. 193. It is not, however, all cases in which a petition is the proper course to reach a fund in Court. *Ib.* See *Tally v. Tally*, 2 Dev. & Bat. Eq. 385; *ex parte Quackenboss*, 3 John. Ch. 408.



Before what  
Judge.

not been set down for hearing, and orders disposing of pleas or demurrers, or special orders upon merits, shown by answer or affidavit, have been made by *both* the Lord Chancellor or Vice-Chancellor and the Master of the Rolls; but the *last* of such orders was made by the Lord Chancellor or Vice-Chancellor; 4th, where the cause has been set down for hearing before the Lord Chancellor, either for the original hearing or for further directions, or on the equity reserved; 5th, Where the decree or last decretal order was made by the Lord Chancellor or Vice-Chancellor, except in cases where the decree or last decretal order was made by the Lord Chancellor on a rehearing of a decree or decretal order, made by the Master of the Rolls."

What interlocutory applications must be heard by the Master of the Rolls.

The 12th of the same set of Orders provides, "That all interlocutory applications, by way of motion or petition, (other than applications for orders of course,) shall, in the several cases after mentioned, be made to the Master of the Rolls, and shall not, except for the purpose of rehearing an Order of the Master of the Rolls, be made to the Lord Chancellor; viz., in the several cases following :—

1st. Where the original information or bill is marked with the words, "Master of the Rolls;"

2nd. Where the cause has not been set down for hearing, and any order disposing of any plea or demurrer or *any special order upon merits shown by answer or affidavit* has been made in the cause by the Master of the Rolls, and no such order has been made by the Lord Chancellor or Vice-Chancellor;

Applications to be made to the Master of the Rolls.

3rd. Where the cause has not been set down for hearing, and orders disposing of pleas or demurrers, or *special order upon merits, shown by answer or affidavit*, have been made by *both* the Lord Chancellor or Vice-Chancellor and the Master of the Rolls, but the *last* of such orders has been made by the Master of the Rolls;

4th. Where the cause has been set down for hearing before the Master of the Rolls, either for original hearing or for further directions, or on the Equity reserved, and is not now set down to be so heard before the Lord Chancellor;

5th. Where the *decree* or last *decretal order* was made by the Master of the Rolls, or by the Lord Chancellor, on the rehearing of a decree or decretal order of the Master of the Rolls."

Foregoing regulations do not apply to orders of course.

It will be observed that these General Orders do not extend to applications for orders of course (*g*). The 14th of the same series of Orders directs, "That all applications for orders of course

(*g*) Last page.

to be obtained on petition or motion shall and may be made in the same manner as if those orders had not been made, but as to all cases in which, according to the 9th preceding Order (A), interlocutory applications (other than applications for orders of course) are directed to be made before the Lord Chancellor, or a Vice-Chancellor, if any order *nisi* upon which cause against making the order absolute is to be shown to the Court shall be obtained as of course from the Master of the Rolls, such cause shall be shown before the Lord Chancellor or a Vice-Chancellor; and if any order of reference to the Master in ordinary shall be obtained, as of course, from the Master of the Rolls, and the Master's report, pursuant to such order of reference, shall be excepted to, the exceptions thereto shall be heard before the Lord Chancellor or a Vice-Chancellor. And in all cases in which, according to the 12th preceding Order, interlocutory applications (other than applications for orders of course) are directed to be made before the Master of the Rolls; if any order *nisi* upon which cause against making the order absolute is to be shown to the Court, shall be obtained, as of course, from the Lord Chancellor or a Vice-Chancellor, such cause shall be shown before the Master of the Rolls, and if any order of reference to the Master in ordinary shall be obtained as of course, from the Lord Chancellor or a Vice-Chancellor, and the Master's report, pursuant to such order of reference, shall be excepted to, the exceptions thereto shall be heard before the Master of the Rolls."

Before w  
Judge.

But where  
order *nisi* i  
obtained, a  
course, in  
Court, the  
order absol  
must be ob  
tained in th  
proper Cou  
according t  
the foregoi  
regulations

Moreover, the 6th Order of the 9th of May, 1839, directs, "That whenever any order of course, obtained from the Master of the Rolls, in any cause marked for, or set down to be heard before the Lord Chancellor, pursuant to the General Order of the 5th of May, 1837, shall be alleged to have been irregularly obtained, any application to discharge the same for irregularity shall, in the first instance, be made to the Master of the Rolls, and such cause, and all other applications to be made therein, shall nevertheless continue subject to all the regulations of the said General Order as if this Order had not been made."

Orders of  
course irreg  
larly obtain  
at the Rolls  
must be dis  
charged th

These last-mentioned Orders distinguish the motions to be made before the Master of the Rolls from those to be made before the Lord Chancellor, or some one of the Vice-Chancellors. The Orders of November, 1841, apply to causes marked for the Lord Chancellor, and determine before which one of the Vice-Chancellors motions and other proceedings in such causes are to be heard.

As to cause  
marked for  
Lord Chan  
cellor.

(A) 13th Order, May, 1837. /

Before what  
Judge.

We have before seen that in all informations or bill with the words "Lord Chancellor," the plaintiff shall, tion, write the title of one of the three Vice-Chance that the cause is thenceforth attached to such Vice-Ch Court (i).

Before which  
Vice-Chancel-  
lor proceed-  
ings are to be  
heard.

By the 5th Order of the 11th of November, 1841, al petitions, and further proceedings in causes in the Lord lor's Court, except any motions or proceedings which part heard, shall be had before the Judge to whose cause shall, under the provisions of those orders, be unless removed therefrom by any special order of the L cellor.

And the 6th of the same Orders directs, "That all motion not in any cause, and all petitions not in any cat are presented to the Lord Chancellor, shall be marke title of one of the Vice-Chancellors, and shall thencefi tached to such Vice-Chancellor's Court, unless removed by any special order of the Lord Chancellor."

Application  
for orders of  
course.

These two last Orders would seem to apply to appli course as well as to special applications; a practice has grown up of allowing certain orders of course, in cause to the Vice-Chancellors' Courts, to be made upon petit Rolls.

During the va-  
cations, ap-  
plications may  
be made to any  
judge.

The foregoing Orders determine before what Judg Court any interlocutory application should be made d sittings of the different Courts. During the vacations ness of these rules is relaxed, for the 15th Order of May, 1837, directs, "That in the interval between tl the sittings after any Term, and the commencement of t before or at the beginning of the next ensuing Term, a for special orders may be made to any Judge of the Co same manner as if those Orders had not been made; b orders which shall be made in any such interval by Chancellor, or by the Master of the Rolls, or by the V cellor, shall, if not made by the Judge to whom the a if made during the ordinary sittings of the Court, w been made pursuant to the directions contained in the be marked as having been made for such Judge, and sh future proceedings of the cause, be, deemed to be th such Judge in all respects save this, that no order so ma Judge for another, under the circumstances aforesaid

(i) Ante, p. 454, 1st Order, 11th Nov. 1841.

reheard for the purpose of being discharged, or varied otherwise than by the Lord Chancellor.

Nature of  
Motions.

This last order was made before the two additional Vice-Chancellors were created, but an Order of the 5th of August, 1842, extends the benefit of its provisions to all the Judges, directing, "That the said 15th Order of the said 5th May, 1837, shall extend to applications for special orders to be made in the interval therein mentioned, and also to orders to be made in such interval by any Judge of the Court of Chancery, as the Court is now constituted, and that subject to the provisions of the said 15th Order of the 5th of May, 1837, the said 5th Order of the 11th of November, 1841, shall not extend to applications and orders to be made in such interval as aforesaid."

During the  
vacations.

## SECTION II.

### By Motion.

A **MOTION** is an application either by a party to the suit, or his counsel, not founded upon any written statement addressed to the Court (1).

Nature of  
motions.

A motion may be made by or on behalf of any of the parties to the record, provided such party is not in contempt (*k*) (2); it is not usual for an individual who is not a party to the record, to be heard to make an application by motion; thus it has been held, that when a receiver has occasion to apply to the Court, he must do so by petition; but where the notice of motion shows the title of the applicant, no long statement of facts is necessary for that purpose; it seems that a person not a party to the suit may apply by motion (*l*). A similar privilege is conceded to a person who is *quasi* a party to the record, such as a creditor coming in under a decree, or a purchaser of an estate sold by order of the Court:

On whose  
behalf made.

(*k*) As to the effect of contempt, after he has served a notice of motion, but before the motion made, will not prevent his making it, *Jeyes v. Foreman*, 6 Sim. 384.  
(*l*) *Jones v. Roberts*, 12 Sim. 189.

(1) A motion can only be repeated on new grounds, and not upon mere additional or cumulative papers. *Ray v. Conners*, 3 Edw. 478; *Fenton v. Lumberman's Bank*, 1 Clarke, 360; *Hoffman v. Livingston*, 1 John. Ch. 211.

(2) See *Johnson v. Pinney*, 1 Paige, 646; *Rogers v. Paterson*, 4 Paige, 450; *Lane v. Ellzey*, 4 Hen. & Munf. 504; 1 Smith Ch. Pr. (2nd Am. ed.) 62, note (a); ante, 554, 555, notes.

Special Motions. to make the motion before the Judge who has properly the cognizance of the cause, unless it be made during the vacation (x).

What motions require notice. It is impossible to lay down any clear rule defining such motions as may be made *ex parte*, and distinguishing them from such as require notice. The General Orders usually state with respect to any application to be made under their provisions, whether it requires notice or not; and special applications concerning the proceedings in the cause, not regulated either by the General Orders or by any clearly defined rule of practice, must almost always be made upon notice (x) (1).

Motions upon affidavit of service of order nisi.

Where an order is made by which a particular act is to be done, unless the other party shall within a certain time show cause to the contrary, (which order is generally termed an order nisi,) the party obtaining the order must, after the expiration of the time limited by the order nisi, if no cause is shown, move for another order to confirm the previous order nisi absolute. The motion, in this case, requires no notice, but the application must be supported by an affidavit to prove the due service of the order nisi, either upon the party himself, when such service is required to be personal, or upon his solicitor, where personal service is not required or has been dispensed with.

What motions require notice.

In the case of *Dobede v. Edwards* (y), an order was made that a cause should stand over, with liberty to the plaintiff to amend within a month, and on his making default, that the bill should be dismissed with costs. The plaintiff made default, whereupon the defendant obtained an order to dismiss without notice, and the C. of England decided that the order was regularly obtained without notice, and refused to discharge it.

Upon notice of motion.

When the application to be made to the Court is not of course, or does not come within that class of special applications which the Court permits to be made *ex parte*, the general practice requires that a statement in writing of the terms of the motion should be served upon the adverse party or his solicitor, a cert

(u) See ante, p. 1786.

(y) 11 Sim. 454.

(z) *Marshall v. Mellersh*, 5 Beav. 496.

(1) Notice of every application to the Court must be given to the opposite party, in case he has appeared, where the motion relates to any matter pending in Court, or where a final order is sought, orders for time, and those of a like nature only excepted; otherwise the applicant will only be entitled to an order nisi. *Isnard v. Cazeaux*, 1 Paige, 39; *Hart v. Small*, 4 Paige, 551.

y is usually Thursday, except it happens to be the second term, or the last day, save one, of the end of the term; in case, as the first and last days of term are always devoted to sittings only, no other motion day is appointed in the weeks in those days occur (z).

the vacation, the only regular motion days are, the seal — during the sittings after term, which are appointed after every term; and no special motion notice can be made after the termination of the last seal term, till the first day of the next term, or the first general sitting for it, unless upon special leave of the Court first obtained giving the party to give notice of the intended motion; also, a special motion is required to be made during the sittings of the Courts after term, at one of the intervals between by special leave. sittings, or when during term a motion of importance is required to be made on any day, not being the first or last day of term, or the days usually appropriated to motions, special leave must be obtained to give notice of the motion for that day, and notice of such special leave having been obtained, must be in the notice of motion.

*Form of notice*  
*Form of notice*  
The application must be properly entitled in the cause in which the application is to be made (a): it must be addressed to the solicitor of the party or parties intended to be affected by it, or to the party himself where personal service is intended; and it must bear the signature of the solicitor, or firm of the solicitor of the party moving. A notice of motion by a party suing or defending *in forma pauperis*, must be signed by the solicitor of such party (b).

It must state the day on which the motion is to be made (2), and if in term, may, as we have seen, be on any day in term;

|                                                             |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
|-------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Special Motions.                                            | to be consented to, it cannot be made till one of the days appointed for motions; out of term, it must be a general seal day, unless special leave has been obtained to give the notice of motion for another day. The notice, however, though it generally expresses the day when the motion is to be made, usually adds " <i>or as soon after as counsel can be heard.</i> "                                                                                                                                                                                           |
| Where made by leave of Court.                               | It is to be observed, that whenever a motion is to be made " <i>by leave of the Court,</i> " the notice ought to mention that it is so made, otherwise the party against whom it is to be made may disregard it (c).                                                                                                                                                                                                                                                                                                                                                     |
| What it must contain.                                       | A notice of motion must state clearly the terms of the order asked for; and here it may be noticed that the Court will not, upon motion, make an order which will decide the principal point of the case, unless upon the consent of all the parties affected by it, which consent must be expressed by their counsel in Court, and cannot be inferred from their not attending in pursuance of the notice of motion (d) (1).                                                                                                                                            |
| Order upon.                                                 | The Court will not, ordinarily, extend the order made, upon a motion, beyond what is expressed in the notice; as where the notice was, that the Court would be moved that the plaintiff might be put into possession, and a receiver appointed, the Court, though the defendant did not oppose the motion, would not direct that nothing should be received by the defendant in the meantime (e); it is therefore necessary, that every thing the party wishes to be obtained upon his motion, should be expressed in the notice, otherwise the Court will not grant it. |
| Costs not given to party moving unless asked for by notice. | Thus, costs are never given to the party moving, unless asked for by the notice of motion; and where a motion was made to take a demurrer and answer off the file for irregularity, Lord Eldon held, that costs ought not to be given, as they were not mentioned in the notice of motion (f) (2).                                                                                                                                                                                                                                                                       |
| Several objects may be included in notice.                  | It is to be observed, that several objects may be included in the same notice of motion; such as the appointment of a receiver, and an injunction and the payment of money into Court (g); or the appointment of a receiver, and payment of money into Court,                                                                                                                                                                                                                                                                                                            |

- (c) *Hill v. Rimell*, 8 Sim. 632.      Where costs are asked for by the notice, the motion is made at the peril of paying costs, if unsuccessful, ib.  
 (d) *Like v. Beresford*, 3 Bro. C. C. 366.      (g) *Lumsden v. Fraser*, MSS. V. C. Nov. 1837.  
 (e) *Prac. Reg.* 287.  
 (f) *Mann v. King*, 18 Ves. 297.

(1) See *Alexander v. Esten*, 1 Caines, 152; *Jackson v. Stiles*, 1 Cowen, 134, 135, note; 1 Smith, Ch. Pr. (2nd Am. ed.) 64, note (a).

(2) *Crippen v. Ingersoll*, 10 Wendell, 603; *Bates v. Loomis*, 5 Wendell, 78.

and the production of papers (*h*). And in some cases, where separate motions are made for two objects, which might have been obtained by one motion, the Court has made a special order, directing the party making such motions to pay the extra costs occasioned by the irregular proceeding (*i*). Special Motions.

No person may join in a notice of motion who is not interested in the result of the application; and so strictly is this rule adhered to, that where the name of an uninterested party is inserted in the notice, with the names of others who are entitled to apply, the Court will refuse the whole motion (*k*). Who may join in the notice of motion.

As a general rule, no person can be heard in support of a motion, unless he has been one of the parties who gave notice (*l*). But when the object of the application is to reverse a conclusion of the Master, it seems, that all persons interested in the Master's report, are entitled to be heard in its support (*m*). This rule seems to have been adopted, in analogy to the practice which prohibits any one from being heard in support of exceptions to a report, unless he has himself excepted, but allows all persons whose rights are affected by the report, to be heard against the exceptions to it (*n*). Who may be heard to support a motion.

The notice of motion must also mention the Judge before whom it is to be made, but it is to be observed, that if a notice is given for a motion before the Lord Chancellor, his Lordship will, unless it is an appeal motion, or unless the party has previously applied for and obtained his Lordship's permission to have it made before him, direct it to be made before a Vice-Chancellor. Must mention Judge before whom to be moved.

When a motion is to be made before the Lord Chancellor, it will be sufficient to state in the notice, "*That this honorable Court will be moved,*" &c. (*o*). Form of notice when before Lord Chancellor.

By an Order of the 13th of Dec. 1814 (*p*), notices of motion intended to be made before the V. C. of England, are directed in future to express that the same are intended to be made before him.

This Order has not been extended to the new Vice-Chancellors, but, it is usual for notices of motion to express before which Judge they are intended to be made, and probably an omission in this respect would be considered as a fatal objection to a motion. Name of the Vice-Chancellor must be stated.

(*h*) *Brown v. Keating*, MSS. Rolls, July, 1840.

(*i*) *Hawke v. Kemp*, 3 Beav. 288.

(*k*) *Folland v. Lamotte*, 10 Sim. 486.

(*l*) *Stubbs v. Sargon*, 3 Beav. 468.

(*m*) *Johnston v. Todd*, 5 Beav. 394.

(*n*) *Bonser v. Cox*, 4 Beav. 382.

(*o*) 1 Smith, 64.

(*p*) Beames's Ord. 484; 2 V. & B. 418.



## Special Motions.

In what cases notice should mention the affidavits to be read.

If it is intended, upon making the motion, to read any affidavits which have been already filed in the cause, such intention ought, in strictness, to be mentioned in the notice of such motion; otherwise the respondent would not have any intimation that such affidavits were to be read, the rules of the Court not requiring him to search for affidavits further back than the date of the notice of motion. But though, in strictness, the affidavits ought to be mentioned in the notice of motion, a separate notice of the intention of the mover to read them, duly served, will be sufficient.

Service of: personal.

All notices of motion for any process of contempt or committal, must be served *personally* upon the party to be affected by it, unless an order had been previously obtained for substituted service.

When persons affected by the notice are out of the jurisdiction.

If any of the persons upon whom the notice of motion is sought to be served should be out of the jurisdiction of the Court, leave must be obtained, upon special application, before service upon them can be effected. In this respect the Orders of May 1845, do not seem to have made any difference in the previous practice. Before they issued, an objection was taken in the case of *Green v. Pledger* (q) to the service of a *subpœna* and the requiring of an appearance, in the case of a defendant out of the jurisdiction, on the ground that such proceedings were not authorized by the statute 4 & 5 Will. IV. c. 82. The answer to the objection was, that that suit was of the particular kind in which the statute conferred jurisdiction (r). The Orders of May, 1845, have now conferred jurisdiction to serve *subpœnas* abroad in suits, and it is presumed that the power to serve notices of motion abroad is equally extensive (s).

Service upon defendant, who has not appeared in due time.

The 3rd Order of April, 1842, provides for the case of a defendant who has not appeared within due time, and directs that "The plaintiff shall, without special leave of the Court, be at liberty to serve any notice of motion or other notice or any petition personally, or at the dwelling-house or office of any defendant who, having been duly served with *subpœna* to appear to

(q) 3 Hare, 169.  
(r) Ante, p. 508.

(s) Ante, p. 511.

(1) In New York, copies of every petition, affidavit, &c. upon which motion is founded, must be served, together with the notice of the motion, *Isnard v. Cazeaux*, 1 Paige, 39; Rule 89, in Chancery; *Brown v. Rich*, 2 John. Ch. 425. As to scandal and impertinence in papers prepared for making or opposing a motion, see *Powell v. Kane*, 5 Paige, 265; 1776-7, note.

answer the bill, shall not have caused an appearance to be entered by his own solicitor or in person, at the time for that purpose limited by the General Orders of the Court." Special Motions.

If personal service upon the party is not necessary, a notice of motion may be served upon his solicitor (*t*). And, as we have seen in the 44th Order of 1828, whenever a person *who is not a party* appears in any proceeding, either before the Court or before the Master, service upon the solicitor in London by whom such party appears, whether such solicitor acts as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service (*u*). Service upon the solicitor.

By the 47th Article of the 16th Order of May, 1845, "There must, unless the Court gives special leave to the contrary, be at least two clear days between the service of a notice of motion, and the day named in the notice for hearing the motion, and at least two clear days between the service of a petition and the day appointed for hearing the petition, but in the computation of such two clear days, Sundays, and other days on which the offices are closed, except Monday and Tuesday in Easter week, are not to be reckoned" (1). At what time service must be made;

This Order does not make any very material difference in the practice which prevailed before it under the 22nd Order of 1828, now discharged. It excludes, as we see, the days upon which the offices are closed, in the computation of the two days that must intervene between service and day of hearing, with the exception of Easter Monday and Tuesday.

By the 5th Order of May, 1845, "The several offices of the Court, except the office of the Accountant-General, and of the Masters in ordinary and Taxing Masters, are to be open on every day of the year except Sundays, Good Friday, Monday and Tuesday in Easter week, Christmas Day, and all days appointed by proclamation to be observed as days of general fast or thanksgiving." What days the offices are closed.

In addition to the days during which the other offices of the Court are closed, the offices of the Accountant-General, Masters in ordinary, and Taxing Masters are closed in vacations. For by the 6th Order, "The offices of the Accountant-General and of the Masters in ordinary and Taxing Masters are to be open on" When the Accountant-General and Taxing Masters offices are closed.

(*t*) Ante, p. 512.

(*u*) The respondents in a charity petition, are parties to it, and, therefore, not within this order, in re *Wilmingtonby's Charity*, 6 Sim. 18; et vide ante, p. 1358.

(1) See *Vandemburgh v. Van Rensselaer*, 6 Paige, 147.

|                                           |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
|-------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Special Motions.                          | every day of the year, except the day specified in Order 5, and except during vacations" (x).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
| How service of notice of motion effected. | By the 7th Order, the offices of the Vacation Master in ordinary, and of the Vacation Taxing Master, are to be open during the vacations on every day except the days specified in Order 5. Service of a notice of motion is effected by delivering a true copy of the notice to the individual on whom the service is made, who, if the service be not personal, is the solicitor of the party.                                                                                                                                                                                                                             |
| Affidavit of service.                     | The individual who serves the notice, should, after serving, make an affidavit of the service, to be used in case the party served should not appear when the motion is made. And it is to be observed that, in an affidavit of this nature, it is not enough to state that notice was given, or the copy delivered to the party's solicitor, but his name should be expressly mentioned, that it may appear with certainty, to whom notice was given, and it must say — " <i>I certify in writing,</i> " or words to that effect (y).                                                                                       |
| What to contain;                          | The affidavit of service ought, in strictness, to be made and filed before the notice is made; it may, however, be filed afterwards, but no order will be drawn up on affidavit of service of motion or petition, unless it be made and filed, at the latest, <i>before the rising of the Court on the day on which the application is made</i> (z).                                                                                                                                                                                                                                                                         |
| When party has not appeared.              | Where a motion is intended to be made, upon notice, against a defendant who has not appeared, and whose time for appearance has not arrived, leave to serve such notice upon him personally must be first obtained from the Court, and mentioned in the notice of motion (a).<br>If a defendant, having been duly served with a subpoena, does not appear within the time limited for that purpose, we have seen, that such an order is now rendered unnecessary (b).                                                                                                                                                        |
| Manner of making.                         | According to the general rule of the Court, upon motion or application, the Judge calls upon each counsel in Court, in turn, according to the order of their names in the roll, to state the substance of their application, and to shew the grounds thereon. By the 10th Order, the same power is given to the Lord Chancellor to order the offices to be closed on particular days, and to vary the periods of vacation.<br>(y) Hind. 452; Prac. Reg. 9; s. 1 vide M'Cauley v. Collier, 1 Ves. 141.<br>(z) Lord Milltown v. Stuart, 8 Si. 34.<br>(a) Hill v. Rimell, 2 M. & C. 64<br>(b) Last page, 3rd Order, April 1842. |

(x) For the length of the vacations in general, see ante, p. 472, but it may here be observed, that the term "vacation," as applied to the office of the Accountant-general, has a slightly different meaning to what it has when applied to the other offices. For the 9th of the same Orders directs, "That the vacations in the office of the Accountant-general are to be the same as in the other offices, except as to the long vacation, which in that office is to commence and terminate on such day as the Lord Chancellor shall

every year direct." By the 10th the same Orders power is given to the Lord Chancellor to order the offices to be closed on particular days, and to vary the periods of vacation.  
(y) Hind. 452; Prac. Reg. 9; s. 1 vide M'Cauley v. Collier, 1 Ves. 141.  
(z) Lord Milltown v. Stuart, 8 Si. 34.  
(a) Hill v. Rimell, 2 M. & C. 64  
(b) Last page, 3rd Order, April 1842.

ng to their seniority, to move, and each counsel, when called upon, has a right to make two motions before the next counsel is called upon. If, upon going through the bar, all the motions are not exhausted, the same process is gone through, *toties quoties*, till all the motions are disposed of.

Special Motions.

If a counsel is unable to make a motion, of which notice is given on the day named, "or as soon after as counsel can be heard," he may save his notice of motion till the next seal or motion day; but if he omits either to make the motion or to save it, the opposite party may, at the termination of the seal or at the next seal, apply for his costs of the motion.

Of saving notice till next motion day.

A motion is made by the counsel to whom it is entrusted, who in making it reads the notice of motion, and the affidavits filed on behalf of the party for whom the motion is made. It is to be observed, however, that he cannot read any affidavits filed before the date of his notice of motion unless notice of his intention to read them, has been duly served on the opposite party (e); nor can he read any affidavit which has not been filed sufficiently long before the motion is made to enable the other side to take a copy of it (1). And here it may be remarked, that it is the duty of the solicitor for the party against whom a motion is to be made, to search the Affidavit Office up to the morning of the day on which the motion is to be made, to ascertain whether any affidavits have been filed: he need not, however, carry this search back beyond the day of the date of the notice (f). The same thing must be done by the solicitor for the party making the motion, in order to ascertain whether affidavits have been filed on the other side. If the motion is not made on the day named in the notice, a party filing a further affidavit ought to give notice of his having done so to the opposite party, or else he should furnish him with a copy of the affidavit so filed.

Of reading affidavits upon.

Search for affidavits.

These rules are sanctioned by the opinion of the V. C. of England in *Clement v. Griffith* (g), who said that, according to strict practice, such affidavits only can be read as are filed between the service of the notice of motion and the day on which, according

In what cases notice of filing affidavits necessary.

(e) Ante, p. 1794.

(f) Ibid.

(g) C. P. Cooper's Rep. 470; so

also Bent v. Reynolds, M. R. June, 1838, *ibid*.

(1) Where original papers are used in opposition to an application, which is denied, the party using such papers must file them, so that the adverse party may obtain copies thereof. *Bloodgood v. Clark*, 4 Paige, 574.

Special Mo-  
tions.

to such notice, the motion is to be made ; that the adverse party is not bound to extend his search for affidavits to a period either prior or subsequent ; and that, consequently, if it is desired to read affidavits, filed at any other time, notice of the filing of such affidavits and of the intention to read them, should be given.

Where affida-  
vit requires an  
answer.

If an affidavit which has been filed upon or in answer to a motion, requires an answer, but it has been filed so recently that an affidavit in answer cannot be procured, the party affected by it should, if he be the party moving, save his notice of motion till a future day ; or, if he be the respondent, he should ask that the motion should stand over, in order that he may file another affidavit. It is to be remarked, however, that it will be no objection to a motion being made, that an affidavit was filed only the day before, if it is an affidavit that cannot be answered ; and, therefore, where a motion was made to extend an injunction to stay trial, and it was objected to on the ground that the affidavit " that the plaintiff could not go to trial with safety till the answer came in," was not filed till the day before, Lord Eldon held that the affidavit was one which could not be answered, and that the motion was regular (*h*).

In injunction  
cases.

In a late case (*i*), the V. C. of England said, that where a plaintiff had obtained an injunction *ex parte*, upon certificate of bill filed and affidavits, and then the defendant made an application, upon counter affidavits, to dissolve such injunction, it was his uniform habit to entertain such application immediately, and not to give the plaintiff any time for replying to such affidavits, — his Honor observed that it was true, that, in some cases, justice might require that the plaintiff should have an opportunity of filing affidavits in reply ; but whether that was so or not, in each particular case, it was his practice to determine for himself after hearing the matter, and that he afforded or refused such opportunity according to circumstances. In another case (*k*), his Honor is reported to have said, that where notice was given of a motion to dissolve an *ex parte* injunction, and on the motion being mentioned it was ordered to stand over, at the plaintiff's request, he would not allow any affidavits to be read at the hearing of the motion, unless they were filed before 10 o'clock of the day for which the notice was given. His Honor added, that he had informed

(a) *Jones v. —*, 8 Ves. 46.

(k) *Anon.* 10 Sim. 50.

(i) *Anon.* July, 1839 ; C. P. Coop. Rep. 471, n.

the Lord Chancellor that such was the course which he meant, in future, to take, and that his Lordship approved of it as a general rule (7). Special Motions.

When the counsel who makes the motion has concluded, he is followed by his junior, if he has one, after which the counsel in opposition to the motion are heard. The counsel for the party moving has then the right of reply, after which the Court pronounces its decision. Course of proceedings.

It is to be observed that the party commencing, upon an application of this nature, has always the right to reply, except in injunction cases, where, upon an order to dissolve an injunction *nisi*, the plaintiff shows cause upon the merits confessed in the answer; then no reply is allowed, the motion for the order *nisi* being considered as the application, to which the plaintiff answers by showing cause upon the merits; after this the defendant's counsel is allowed to argue against the cause shown by the plaintiff, and this is considered as the reply. Right of reply,

In deciding upon a motion, the Court sometimes extends its order to the costs of it; that is, if it dismisses it, it frequently dismisses it with costs, though, as we have already seen, it cannot grant it with costs, unless the costs have been specifically mentioned in the notice of motion (m) (1). Costs of motion.

When no order is made respecting the costs of a motion, they become subject to the rules already pointed out with reference to "*costs in the cause*" (n) (2).

If a party who is not interested in the result of a motion is served with the notice of motion, he will be entitled to the costs of appearing (o). Of a party not interested.

It may be mentioned in this place, that, in some cases, where a party succeeds in his motion, he will be ordered to pay the costs of it; thus where he applies for an order which is for his own party. — in what cases paid by successful party.

(7) For further information, as to the practice of reading affidavits in injunction cases, vide post, Chap. "Injunctions." (m) Ante, p. 1791. (n) Ante, p. 1519. (o) Heneage v. Aikin, 1 J. & W. 377.

(1) See Kane v. Van Vranken, 5 Paige, 62; Seebor v. Hess, 5 Paige, 85. (2) See Rogers v. Rogers, 2 Paige, 459; Wilkinson v. Henshaw, 4 Paige, 257.

If a party succeeds in a motion, and obtains an order for costs, and no direction is given as to them, and he obtains a general decree for costs, he shall be allowed costs of the motion. Stafford v. Bryan, 2 Paige, 45. But this rule does not apply if the motion be granted as a mere matter of favor, or to relieve the applicant from the consequences of his own default. Ib.

Costs should not be taxed upon overruling or sustaining a motion to dissolve an injunction. Barnett v. Spencer, 2 Hen. & Munf. 7.

**Special Mo-  
tions.**

benefit, he will, in general, be ordered to pay all the other party's costs occasioned by the application; upon this ground where a plaintiff, in a foreclosure suit, applied, under the Order of the 9th May, 1839 (*p*), the V. C. of England ordered the cause to be advanced, and the plaintiff to pay the costs of motion (*q*).

**Costs of abandoned motion.**

Formerly, if a party gave notice of a motion which he afterwards abandoned, he was not liable to pay to the other party costs of appearing to oppose the motion, until a notice of the same motion had been given three times, without its being made, and then, upon a fourth notice, the opposite party might object to such motion being heard, until the cost of the three former notices were paid (*r*) (1); but, by an Order of Lord Eldon, dated the 5th August, 1818 (*s*), it is ordered, "That if a party gives notice of motion and does not move accordingly, he shall, if no affidavit is filed, pay to the other side forty shillings costs, and the production of the notice of motion; but that, when an affidavit is filed by either party, the party giving such notice of motion not moving, shall pay to the other side costs, to be taxed by the Master, unless the Court shall direct, upon production of the notice of motion, what sum shall be paid for costs."

**Costs of abandoned motion, how obtained;**

Under this Order, if a motion is not made according to the notice, the respondent must apply to the Court for his costs, according to the terms of it; and the costs cannot be granted unless notice is mentioned to the Court: nor will the order for costs be drawn up, unless the notice is produced to the Registrar (*t*).

**— not given after bill dismissed; nor after abatement;**

It is to be observed, that an order for the costs of an abandoned motion will not be made after the bill has been dismissed for want of prosecution (*u*); and that where a plaintiff gave a notice of motion and died before it was made, upon his executors' reviv-

(*p*) Ante, p. 1177.

(*q*) *Brown v. Lockhart*, 9 Law J. (N. S.) Chan. 53; in a more recent case, however, where a similar application was made, which was opposed on behalf of an infant who was entitled to a charge upon the estate, the Vice-Chancellor ordered the cause to be advanced, but refused to allow the infant his costs of appearing upon the motion, although he had been served with notice of it, pursu-

ant to his Honor's decision in *Pe v. Calloway*, 9 Law J. (N. S.) C. 337.—*Thornycroft v. Crockett*, Hil. Term. 1841, MSS.

(*r*) Vide *Shelley v. Shelley*, 8 316; *Anderson v. Palmer*, 14 151.

(*s*) 1 Swanst. 128; 3 Mad. 31

(*t*) *Withey v. Haigh*, 3 Mad.

(*u*) *Farquharson v. Pitcher*, 41 510; and ante, p. 937-8.

(1) See *Blake v. Blake*, 2 Hogan, 190.

the suit, the V. C. of England refused to give the defendants their costs as of an abandoned motion (x). The same suit was afterwards revived by the executors of the deceased plaintiff, and, upon the hearing, the bill was dismissed with costs; in taxing the costs, the Master disallowed the defendants their costs of the abandoned motion, whereupon they presented a petition praying liberty to except to the Master's certificate; but Sir C. C. Pepys, M. R., being of opinion that the case was unprovided for by Lord Eldon's Order of the 5th August, 1818, directed a reference to the Six Clerks, to ascertain whether, previously to that Order, the costs of an abandoned motion were costs in the cause; and upon those officers certifying their unanimous opinion that they were not, the petition was dismissed with costs (y).

In what Cases Proper.  
not costs in the cause.

Where an order for the payment of the costs of an abandoned motion has been made, under the above Order, a renewed motion, to the same effect as the abandoned motion, cannot be made till the costs have been paid (z) (1).

New motion cannot be made till costs of abandoned motion paid.

## SECTION III.

## By Petition.

A **PETITION** is the request of a person in writing, directed to the Chancellor or Master of the Rolls, showing some matter or cause whereupon the petitioner prays some direction or order (a).

General nature of petitions.

Petitions may be presented, either in a cause or in a matter over which the Lord Chancellor or the Court of Chancery has jurisdiction under some Act of Parliament or other special authority. On the present occasion, however, the reader's attention will be directed chiefly to petitions in causes pending in the Court, which for that reason are generally termed "*cause petitions*;" the discussion of petitions in other matters will be reserved for a future part of the Treatise.

In what cases presented;

In general, a petition cannot be presented in a cause till the bill has been filed. The case of a plaintiff petitioning to sue in *forma*

not before bill filed.

(x) Warner v. Armstrong, 4 Sim. 140. (z) Bellechamber v. Giant, 3 Mad. 550.  
(y) Lewis v. Armstrong, 3 M. & K. 69. (a) Har. (ed. Newl.) 417.

(1) See ante, 1787, note; Ray v. Connor, 3 Edw. 478.



|                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Form of.                     | <i>pauperis</i> , appears to form an exception to this rule (b); and, in the Mayor of London v. Bolt (c), Lord Loughborough is reported to have said that he should have no difficulty in granting an injunction to restrain waste, upon petition and affidavit, before bill filed; that he had frequently done so. In that case, however, the order was not made till a certificate of the bill having been filed was produced (d); and the practice is now uncommon, though in very pressing cases it may, it is apprehended, be resorted to (e). |
| Except in particular cases.  | A guardian may also be appointed for an infant and maintenance allowed, without bill filed (f) (1).<br>Petitions are sometimes also presented upon collateral matters, as they have relation to some former suit or cause depending, or to an officer of the Court, as to have a clerk's or solicitor's bill taxed, or to oblige him to deliver up papers, &c. (g).                                                                                                                                                                                 |
| For orders of course.        | Petitions are either for orders of course, or for special orders. Petitions for orders of course are forthwith granted, without any attendance being ordered; if they are for special matters, a day is appointed for hearing them. Most things which may be moved for of course, may also be obtained, as of course, upon petition.                                                                                                                                                                                                                |
| To what judge addressed.     | Petitions are generally addressed to the Lord Chancellor, touching the setting down of pleas, demurrers, or exceptions to be argued before himself or a Vice-Chancellor, and concerning special orders to be made by himself, or a Vice-Chancellor, and for rehearings; but, in most other cases, for the reasons before stated, petitions for matters of course are usually made to the Master of the Rolls, who may also be petitioned to rehear a cause heard before himself (h).                                                                |
| Title of.                    | A cause petition must be properly entitled in the cause in which it is presented, and must, when not for a matter of course, be addressed to the Judge to whom, according to the regulations made by Orders of the 5th of April, 1837, such petition ought to be presented (i).<br>The petition then states by whom the petition is presented, and the particulars of the case, and concludes with praying the Court to make the order required.                                                                                                    |
| Scandal and impertinence in. | Brevity and form are the two things chiefly to be observed in<br>(b) Har. (ed. Newl.) 417.      dian and Maintenance."<br>(c) 6 Ves. 129.      (g) Harr. (ed. Newl.) 418.<br>(d) 6 Ves. 130.      (h) Ibid. 419; et vide ante, p. 1622.<br>(e) Vide post, "Injunctions."<br>(f) Post, "Applications for Guar-      (i) Ante, p. 1783-4.                                                                                                                                                                                                             |

(1) Matter of Bostwick, 4 John. Ch. 102; ante, 1782-3.

petitions (*k*), to which may be added care to avoid scantinence, for which a petition, as well as any other *gs*, may be referred (*l*). Petitions of Course.

on must be fairly written upon paper, but it need not be on parchment (*1*). Except it be for a rehearing or appeal, not signed by counsel, nor need it be prepared by one; but by the Order of May, 1845, the Taxing Master is directed, in taxation between party and party, the costs of such as appear to have been proper to be settled by coun-

as addressed to the Lord Chancellor must be left with the clerical secretary, who, if it is not for a matter of course (*n*), must be presented to the Lord Chancellor. It is to be answered by means of a memorandum, written in foot, and signed by his Lordship, directing all parties to attend before him on the next day of petitions (*o*), or on a previous application either to his Lordship, or a Vice-Chancellor, permission has been given to have the petition answered on an earlier day. When the petition is answered, it must be left with the Lord Chancellor, and a fair copy of it must be left for the use of the

as addressed to the Master of the Rolls, must be left with the clerical secretary at the Rolls, who, if the petition be not of course, must be presented to the Master of the Rolls. It is to be answered in the same manner as petitions addressed to the Lord Chancellor.

By the practice upon petitions of course, was for the secretaries to obtain the Master of the Rolls' *fiat*, upon which the order was drawn up and passed, and entered by the Registrar in the same manner as others orders of course; but the 29th Order of Council effected an important change in this respect, directing that in a view to the convenience of the suitors and their solicitors, the order should be drawn up and passed for the purpose of diminishing the expense of orders of course, which, according to the practice of the

(ed. Newl.) 417. p. 524. It is stated, in 1 J. & W. 326, n., no instance in which a hearing has been referred to; the names of the parties who sign the petition, are considered a sufficient indication that it contains nothing

(*n*) Petitions for matters of course are very seldom presented to the Lord Chancellor; but if they are, upon his Lordship's *fiat* being obtained, they are taken to the Registrar who draws up the order.

(*o*) The days for hearing petitions are generally appointed in the seal paper, issued previously to and after each term.

, p. 1581-2.

ons must be sworn to. Anon. 1 Hopk. 101. See N. York Rule, very; Matter of Christie, 5 Paige, 242.

Practice upon  
Petitions of  
Course.

Where ad-  
dressed to the  
Master of the  
Rolls.

What petitions  
must be  
served;

— at what  
time.

Where they do  
not require  
personal  
service.

Where per-  
sonal service  
is requisite.

Court, may be presented to the Master of the Rolls, or secretaries of the Master of the Rolls shall, upon any application of course, (*except upon petitions for setting down cause reheard,*) which shall be presented to his Honor, instead of such petitions as heretofore, draw up the orders in such form as the Master of the Rolls shall, from time to time direct; every such order to be signed, as passed, with the chief secretary. And the under secretary shall enter, or be entered, every such order, in a book to be kept at the clerk's office, at the Rolls, for that purpose, and shall then sign such order, with his initials, as entered; and that the clerks of the Court and their solicitors shall have access to the orders during office hours, without the payment of any fee; and every such order so to be made as aforesaid, there shall be paid the same fees as have hitherto been payable in respect of such petitions as aforesaid, in lieu of the fees on such petitions; and there shall also be paid to the chief secretary, for filing every such petition, the sum of one shilling; and to the under secretary for entering every such order, the sum of sixpence. And every such order so made as aforesaid, shall have the same force and effect as if it were of course passed by the Registrars now have, and without payment of the fees heretofore payable on such orders at the Registrars' Office; and for every office copy that may be required of such order, there shall be paid to the chief secretary (who shall mark the same as examined, and authenticate it by his initials thereto) the sum of sixpence and no more for the same."

All petitions, except those which are of course, require to be served upon the adverse party, unless there is no other party interested in the matter, as in the case of petitions for the transfer of stock, or the payment out of Court of money standing to the credit of the petitioner, in which case no separate account of the petitioner, in which case no personal service is necessary.

Two clear days must intervene between the service of the petition and the day appointed for hearing it, as in the case of a petition for the transfer of stock.

Service in cases which do not require personal service is effected by delivering a copy of the petition, as answered, to the adverse solicitor (*p*), at the same time showing him the petition and answer thereto.

Personal service is effected by delivering a copy of the petition to the party, and showing him the original in the same manner. If the petition require personal service, and the party is not found, the petition may be served on the party's solicitor (*p*).

(*p*) Vide the manner of serving notices of motion, ante, p. 1

be found, an application must be made by motion, upon affidavit, for an order to substitute service, by leaving a copy of the petition at the party's dwelling-house, or place of abode, with one of the family, or upon the solicitor (r).

Service of  
Petition.

It is to be recollected that whenever a person *who is not a party* appears in any proceeding, either before the Court or before the Master, service upon the solicitor in London by whom such party appears, whether such solicitor act as principal or agent, shall be deemed good service, except in matters of contempt requiring personal service (s).

Substituted  
service.  
Service upon  
a person not  
a party.

Petitions which are not of course are set down in the paper of petitions appointed for the day, and are called on in their regular order. The rules with regard to reading affidavits and the general practice upon the hearing are nearly the same as those with regard to motions (t).

Setting down.  
Rules with re-  
gard to affida-  
vits.

If, upon the hearing, the petitioner does not appear, the petition will be dismissed with costs, upon the production by the respondent, of an office copy of an affidavit of service of the petition, made by the person upon whom it was served (u). On the other hand, if no one appears against the petition, an order, conformable to the prayer thereof, will be made on production of an affidavit of the service of the petition upon all the parties interested, provided the case justifies the order. In either case, the affidavit of service must be made and filed before the rising of the Court on that day (x).

Where party  
does not ap-  
pear.

In *Garey v. Whittingham* (y), Sir T. Plumer, M. R., stated the rule of the Court to be, that a party, who is served with a petition, but who has no interest in the order to be made upon it, is not entitled to the costs of appearing on the hearing of that petition; and, in many cases, the same learned Judge appears to have acted upon that rule, and to have refused costs to parties whose appearance was not necessary, but who, having been served, chose to appear (z). Since the death of Sir Thomas Plumer, however, the practice has been altered, and every party who is served with a petition is considered entitled to his costs of appearing upon it, whether he is interested in the matter or not (a).

Every party  
served entitled  
to costs.

It may be useful to mention that if a party having an objection to the form of a petition, has also a case upon the merits, he should

Costs of peti-  
tion standing  
over.

(r) 2 Turn. & V. 229.

(s) 44th Ord. 1828, ante, p. 514.

(t) Ante, p. 1797-8.

(u) 1 Smith, 76.


(x) Ante, p. 1796.

(y) T. & R. 405; vide etiam, Tem-

pleman v. Warrington, 1 J. & W. 377, n.

(z) Ibid.

(a) Ibid. nota, et vide Heneage v. Aikin, 1 J. & W. 377.

*Form of*  


be prepared with his affidavit in answer to the petition upon the motion in case the objection to the form should be overruled; the Court will not permit the petition to stand over in order that he may file affidavits, but upon the return of him paying the cost of the petition standing over to be taxed by the Master B.

*Of the petition*  
*being*

By the 27th of the Orders of 1833, it is directed that, when any order made on a petition be passed, the original petition be filed with the Clerk of the Reports.

*Copy of petition when*  
*filed.*

Where, however, a petition presented at the Rolls, was afterwards heard, together with other petitions at the same time, before the Lord Chancellor, but before the order was passed, the original petition was lost, the Lord Chancellor allowed a copy of it, certified by the under secretary at the Rolls to be a true copy, to be filed instead of the original petition (c); and where a petitioner, whose petition had been dismissed with costs, refused to deliver up the original petition in order that it might be filed here was given to the respondents to file, in its stead, the copy of the petition with which they had been served (d).

#### SECTION IV.

##### *Orders upon.*

*How drawn up, passed, and entered.*

ORDERS made upon interlocutory applications, except orders made upon petition, as of course, at the Rolls (e), are drawn up, passed, and entered in the same manner as decrees or orders made upon a hearing (f).

*Form of.*

By the 27th of the Orders of 1833, it is directed, "That in orders made upon petitions, no part of the petition be stated or recited except the prayer (g), and that the same principle of brevity be observed in all the orders of this Court made upon motion, so far as may be consistent with a statement explaining the grounds upon which the order is made;" and it is to be recollected, that, by the same Order, it is directed that before any order made on a petition be passed, the original petition be filed with the Clerk of Reports.

(b) *Ex parte Bellott*, 2 Mad. 261.

(c) *Sanderson v. Walker*, 1 M. & C. 359.

(d) *Andrews v. Walton*, 1 M. & C. 360.

(e) *Vide ante*, p. 1803.

(f) *Vide ante*, p. 1214-15.

(g) The form of an order upon a petition is given in the appendix to the above Orders.

All interlocutory orders must be served upon the opposite party. By Petition.  
 Service is effected by delivering to the party served, or where personal service is not necessary, to his solicitor, a copy of the order, How served.  
*showing him, at the same time, the original (h).*

If it is intended to enforce the performance of the order by process of contempt, the order must be served upon the party to be affected by it, unless a special order has been obtained to authorize substituted service (i) (1). And where an order was made for the payment of a sum of money by two solicitors, who were in copartnership, service of the order upon one, leaving a copy at the place where the partnership business was carried on, was held not to be sufficient to ground a proceeding for a contempt (k).

There does not seem to be any difference in the process of contempt to enforce an order made upon motion or petition, from the process applicable upon decrees and decretal orders (l).

It has been already stated, that interlocutory orders, made upon motion, may be altered, varied, or discharged upon motion (2), How varied, altered, or discharged.  
 and that orders of course, made upon petition, may be discharged by the same process (m); but after an order made upon petition has been drawn up, leave will not be granted to amend it, without another petition being presented, praying for a variation of the order (n).


Orders made *ex parte*, upon petition, may also be discharged upon motion, where the application is made on the ground of irregularity (3). — when made upon petition.  
 The rule is, however, different with regard to or-

(1) It is absolutely necessary that original order should be shown at same time that the copy is served, unless the production of the original is waived. *Wallis v. Glynn*, 12 Ves. 282; *Cooper*, 282, S. C.  
 (2) *Hunter v. —*, 6 Sim. 429.  
 (3) *Young v. Goodson*, 2 Russ. 255.  
 An order for payment of costs is several as well as joint, and the subpoena may be served upon either or all, ante, p. 1595.  
 (l) Ante, p. 1244.  
 (m) Ante, p. 1616.  
 (n) In re Marrow, Cr. & Ph. 146.

(1) See *Lorton v. Seaman*, 9 Paige, 609.  
 personal service will be dispensed with where the party cannot be found. And where an order is served upon the solicitor, if knowledge of such service is brought home to the party, he will be in contempt by not obeying the order, in the same manner as if it had been served upon him personally. *People v. Brower*, 4 Paige, 405. See *Stafford v. Brown*, 4 Paige, 360.

(2) See *Fanning v. Dunham*, 4 John. Ch. 35.  
 An order or decree by consent cannot be modified or varied in an essential part, without the assent of both parties to the same. *Leitch v. Cumpston*, 4 Paige, 476.

(3) Orders may be opened, varied, and discharged upon application to the Court, and for good cause shown, such as mistake, surprise, irregularity, &c. *Ashe v. Moore*, 2 Murphy, 388. See *Fanning v. Dunham*, 4 John. Ch. 35; *Higbie v. Edgerton*, 3 Paige, 253; *Osgood v. Joslin*, 3 Paige, 195; *Hunt v. Wallis*, 6 Paige, 371.

**By Petition.**  ders made upon the merits of a petition duly heard, which, have seen, must be the subject of a regular rehearing. When, however, the objection to the petition, and the order thereupon, was, that they were entitled in a non-existing cause, the Court discharged the order on motion (p).

**Order not to be treated as a nullity, although made by the wrong Judge.** It may be noticed here, that an order made by a branch of Court, which, under the Orders of 1837, has not properly jurisdiction over the cause, must, till discharged, be treated as an order, and the party served with such order is not at liberty to treat it as a nullity by obtaining another order inconsistent with it, from the proper branch of the Court (q).

(o) Ibid.

(p) *West v. Smith*, 3 Beav. 306.

(q) *Wilkins v. Stevens*, 10

617; *Boddy v. Kent*, 1 Mer. 21

## CHAPTER XXXV.

### OF INJUNCTIONS.

#### SECTION I.—*Different Sorts of Injunctions.*

As pointed out, in the last Chapter, the general nature of Of the nature  
injunctory applications, and of the practice arising upon them, of injunctions.

He will now proceed to the discussion of those applications  
are most generally addressed to the Court in the course of  
; and, in doing this, his intention is, in the first instance,  
to attract the practitioner's attention to applications for those pro-  
hibitory writs and orders which the Court has the power of issu-  
ing for the purpose of restraining a party from exercising his  
rights in a manner productive of injury to the party ap-  
pearing in a litigation in the cause. These are writs of  
injunction, restraining orders, stop orders, and writs of *ne exeat*  
the three former being restrictive of the party's right of  
disposal of property, and the last of the right, which every Brit-  
ish subject enjoys, of quitting the country whenever he may be  
desired to do so (a).

A writ of injunction may be described to be a judicial process,  
by which a party is required to do a particular thing, or to refrain  
from doing a particular thing, according to the exigency of the  
case. The process, however, is rather preventive than restorative,  
it is by no means confined to the former object (1).

There are other writs issuing from the Court of Chancery, which, *ibid.* 563, the former of which is near-  
ly obsolete; and the latter of which,  
do not come within the des- not being necessarily returnable in  
cription of writs issued upon inter- Chancery, can scarcely be said to be-  
long to the equitable jurisdiction of  
orders. These are writs of the Court. The present section will  
be devoted to the consideration of  
the practice relating to writs of in-  
junction.  
i, which are the judicial  
processes used upon a bill filed express-  
ly for the purpose of procuring them,  
viz. *de homine replegiando*, Har.  
1.) 562, and of *supplicavit*,

Story Eq. Jur. § 861, § 862. It seeks to prevent a meditated wrong  
rather than to redress an injury already done. It is not confined to



**Different Sorts of Injunction.** Injunctions are either provisional or perpetual: *provisional* injunctions are such as are to continue until the coming-in of the defendant's answer; or until the hearing of the case; or until the Master has made his report: *perpetual*, are such as form part of the decree made at the hearing, upon the merits, whereby the defendant is perpetually inhibited from the assertion of a right, or perpetually restrained from the commission of an act which would be contrary to equity and good conscience (*b*).

**Provisional.**  
**Perpetual.**

Injunctions of this nature, however, scarcely come within the scope of the present Chapter, — the object of which is chiefly to point out the case in which the Court will grant this writ upon interlocutory applications (*c*).

**Common.**

Provisional injunctions are generally divided into two kinds, *common* and *special*. *Common injunctions* are those which are granted as of course,—upon a defendant being in default for not appearing or for not answering within the time limited for that purpose by the orders of the Court. *Special injunctions* are those which are granted upon special grounds arising out of the circumstances of the case; injunctions of this description are issued sometimes on the merits disclosed by the answer, sometimes on affidavits before the answer is filed, and sometimes even without notice and before the defendant has appeared (*d*).

**Special.**

(*b*) For. Rom. 194, 195.

(*c*) There is also another species of injunction, which was formerly familiar in practice, viz., injunctions to deliver up possession of property; injunctions of this nature were consid-

ered necessary before a writ of assistance could be issued to the sheriffs, but they have now been discontinued. Vide ante, p. 1281.

(*d*) Beames's Ord. 16.

cases falling within the exercise of the concurrent jurisdiction of the Court; but it equally applies to cases belonging to its exclusive and to its auxiliary jurisdiction. 2 Story Eq. Jur. § 863; Jeremy on Eq. Juris. B. 3, ch. 2, § 1, p. 308. The most common sort of injunctions is that, which operates as a restraint upon a party in the exercise of his real or supposed rights; and this is sometimes called the remedial writ of injunction. The other sort, commanding an act to be done, is sometimes called the judicial writ, because it issues after a decree, and is in the nature of an execution to enforce the same; as, for instance, it may contain a direction to the party defendant to yield up, or to quiet, or to continue, the possession of the land, or other property, which constitutes the subject-matter of the decree in favor of the other party. 2 Story Eq. Jur. § 861; Eden on Injunct. ch. 1, (2nd Am. ed.) 9 to 13.

In *Stone v. Hobart*, 8 Pick. 464, 466, the Court in Massachusetts, say, "we have no power in Chancery, except by statute; and the general authority to issue injunctions has not been given. The exercise of such a power exists only when the subject-matter falls within the jurisdiction granted by the legislature." "Injunctions against proceedings at law are within the general jurisdiction of Chancery, which we are not authorised to assume." But the powers of the Court are considerably enlarged under the Revised Statutes, and applications to restrain proceedings at law in certain cases would probably be now entertained. See *Altas Bank v. Nahant Bank*, 23 Pick. 480, 492.

## SECTION II.

## Of Common Injunctions.

*Common injunctions* are those which are granted upon the defendant's default, either in appearing or answering, and are only applicable to restrain proceedings in the Courts of Common Law (1). What are common injunctions.

In order to entitle a party to an injunction by default, there must be a previous good service of the *subpœna*, either in the ordinary way (e), or, if the party is resident abroad, by substitution, to authorize which an order must have been previously obtained in the manner already pointed out (f). Not obtained until there has been due service of *subpœna*;

It is to be recollected that, in an injunction cause, it is not, as in ordinary cases, necessary that the bill should be on the file before the *subpœna* is issued; and that if it is on the file at the return of the *subpœna*, or on the opening of the office on the morning after, it will be sufficient (g). — but bill need not be filed till the return.

The time for a defendant's appearance named in the *subpœna*, is, in all cases, when the defendant is within the jurisdiction eight days (h); if the defendant fails to appear within that time, he will then be in contempt; and, as we have seen (i), "if the bill prays for an injunction to stay proceedings at Law, the plaintiff may obtain an order for the common injunction, if no injunction has been previously obtained." When ordered for not appearing.

By the 59th Order of May, 1845, "The plaintiff in a bill praying an injunction to stay proceedings at Law is entitled, as of course, on motion or petition, and without an attachment, to the common injunction for want of appearance, if a defendant has not appeared, in person or by his own solicitor, on or after the expiration of eight days from the service of the *subpœna*, and for want of answer, if a defendant is in default for want of answer on or after the expiration of eight days from the day on which an appearance was entered by or for him." Where obtained for want of appearance. Where for want of answer.

(e) Ante, p. 499.

(f) Ibid. p. 503.

(g) Ibid. p. 592-3.

(h) Vide form of *subpœna*, 496.

(i) Ante, p. 517, 16th Ord. Art. 3.

(1) In 1 Hoff. Ch. Pr. 78, it is said, "There is nothing in our practice similar to this English practice of issuing the writ upon the presumed admission of the defendant, by his default, of the plaintiff's right to it. A special application is always made to the Chancellor, Vice-Chancellor, or Master, and the merits of the application are examined by him. Thus a great number of the English rules become inapplicable." See 1 Smith Ch. Pr. (2nd Am. ed.) 591, note (a); *Elmslie v. Delaware and Schuylkill Canal Co.* 4 Whart. 424; *Poor v. Carlton*, 3 Sumner, 73, 74.

**Of Injunctions** These Orders do not seem to have made any great difference in the practice that prevailed before they issued, under the 4th Order of 1833, now discharged. It was doubtful, under the former practice, whether an attachment must not have been sealed for want of appearance before an injunction could have been obtained — but this is clearly not now necessary. Previously, however, to the order for an injunction issuing against a defendant for want of appearance, it is necessary that an affidavit proving due service of a subpoena should be filed. The 11th Article of the 18th Order of May, 1845, is to the same effect as the 59th Order above quoted, so far as relates to obtaining an injunction after appearance; but it may be convenient to give the exact words of it, which are — “A defendant desiring to avoid the common injunction for default of answer, has for that purpose only eight days after appearance within which he is to plead, answer, or demur to a bill, praying an injunction to stay proceedings at Law. If he does not plead, answer, or demur, within such eight days, the plaintiff is entitled, as of course, and without an attachment, to the common injunction.”

**Affidavit of service of subpoena necessary.**

**Mode of computing the time.**

**When motion for common injunctions may be made.**

**In vacation.**

The manner of computing the periods is now fixed by the 11th Order of May, 1845 (*k*), and seems to be the same in effect as what it was before the last mentioned Order (*l*).

Under the practice which prevailed before the Orders of May, 1845, the common injunction, either for want of appearance, or for want of answer, might have been obtained upon any day on which the Court was sitting. Before the Orders of 1833, it could only have been obtained on a seal day out of Term time (*m*).

It will be observed, that the 59th Order above stated enables an injunction to be obtained upon petition of course as well as upon motion of course; the effect of this is important, as hereafter orders for injunctions need not in all cases necessarily be applied for by motion in Court, but may be drawn up by the secretary of the Master of the Rolls on petition under the 29th Order of 1833 (*n*). By this means the common injunction may hereafter be obtained during the vacation, and at any time when the offices are not closed under the 5th Order of May, 1845 (*o*). The words of the 59th Order seem to be general enough to include bills of all descriptions; it appears, therefore, that the decision of Lord Cot-

(*k*) Ante, p. 404.

(*l*) Stanley v. Bond, 1 Ph. 103.

(*m*) 10th Ord. of 1833, discharged. Brierley v. Walsdaley, 1 Keen, 141;

Earl of Chesterfield v. Bond, 2 Beav. 263.

(*n*) Ante, p. 1803.

(*o*) Ante, p. 1795.

ham in *Brooks v. Purton* (o) is equally applicable to this Order, <sup>Motion for.</sup> it was to the 10th Order of 1833, to which it directly applied. <sup>When bill amended before answer.</sup> this be the case, an injunction may be obtained for want of appearance, or answer to an amended or supplemental bill, exactly as an original bill, provided that no answer has been put in.

If an answer has been put in, the practice by the 3rd Order of <sup>When after answer.</sup> 1839, is, "That in case an injunction to stay proceedings at Law shall be prayed for by the bill, and shall either not be obtained, or, having been obtained, shall have been dissolved upon the merits stated in the answer, and the plaintiff shall afterwards send his bill; and the defendant shall not plead, answer, or demur, to the amended bill, within eight days after appearance, the plaintiff shall be entitled to move for an injunction, upon affidavit of the truth of the amendments."

This Order is carried out by the 36th Article of the 16th Order of May, 1845, which directs that, "A defendant being served with a *subpoena* to answer an amended bill praying an injunction to stay proceedings at Law, and desiring to avoid a motion for injunction on affidavit of the truth of the amendments, has for that purpose only eight days after appearance, within which he is to plead, answer, or demur to such amended bill."

It seems clear from the above-mentioned case of *Brooks v. Purton*, that these two Orders refer only to the case where an answer has been put in to the bill, and in such a case they prevent an injunction being obtained unless the application is supported by an affidavit of the truth of the amendments. <sup>Orders only apply where amendment made after answer.</sup>

It is clear, from the foregoing remarks, that there are only three ways of preventing the common injunction from issuing, viz., by putting in a plea, an answer, or a demurrer, before the injunction issued (1). If a demurrer is filed within the eight days, or at any time before the order for the injunction is made, the plaintiff cannot move for an injunction till the demurrer has been disposed of; for, as the demurrer insists that the plaintiff has no right, it is by no means clear, till it has been heard, that the injunction ought to go (p). The same rule applies where a plea is put in before the injunction has been ordered (q); but, lest these evasions should be put in for the mere purpose of creating delay, the Court, on a proper application, will order them to be accelerated. <sup>How prevented, — by demurrer, — by plea.</sup>


o) Cr. & Ph. 233.

113; *Humphreys v. Humphreys*, 3

p) *Cousins v. Smith*, 13 Ves. 164. P. Wms. 348.

q) *Ante*, p. 659; *Anon.* 2 Atk.

r) See *Hall v. M'Pherson*, 3 Bland, 529.

- Motion for.  ted and argued immediately, and if they are overruled on argument the injunction will follow.
- When prevented by answer. To prevent the common injunction from issuing, by filing an answer, the answer should be *upon the file* within eight days after the defendant's appearance, or at least before the order for the injunction is made; and it will not be sufficient that the answer should be sworn to before the writ issues, if it is not actually filed *before the order is made* (t), the rule being that an injunction takes effect from the date of the order, and not from the time of sealing the injunction (u) (1).
- Exceptions to answer. It is also necessary that the answer should be sufficient, for an answer that is insufficient cannot be said, in a correct sense, to be an answer to the bill (x); for this reason, before the Orders of May, 1845, a plaintiff was allowed in an injunction cause to refer defendant's answer for insufficiency *instantly*, without waiting the eight days. Whether this privilege will continue (notwithstanding the express language of the 16th Order of May, 1845, Art. 21), has not as yet been determined.
- Whether Extensions may be referred instantly. Before the Orders of 1845 there was a difference, with respect to the practice of referring exceptions for insufficiency, between injunction causes and other causes. One instance in which this difference prevailed was where the defendant put in an answer in an injunction cause so soon after appearance as to prevent the injunction issuing; under such circumstances the plaintiff could have referred the answer for insufficiency immediately upon the filing of the exceptions (h). A second instance in which the practice in injunction causes differed from that in other causes, was where the plaintiff showed exceptions for cause against the dissolution of the injunction. Under these circumstances also the practice was for the exceptions to be referred *instantly*. In other causes the practice was governed by the 5th Order of 1828, which directed that, "When exceptions taken to an answer for insuffi-
- (t) Bruce v. Webb, 3 Mer. 474.
- (u) Rattray v. Bishop, 3 Mad. 220. Where, owing to the delay in filing a demurrer, judgment had been obtained at Law, and the plaintiff in Equity was taken in execution, Lord Eldon discharged him out of custody on his undertaking to confess judgment *de novo*, so that he might not afterwards
- say that the judgment had been satisfied by the execution from which he had been discharged. Franklyn v. Thomas, 3 Mer. 225.
- (x) Gregor v. Lord Arundel, 3 Ves. 87.
- (h) Candler v. Partington, 6 Mad. 102.

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(1) In Ramsdall v. Craighill, 9 Ohio, 197, it was held that an injunction operates only from the time process is served.

are not submitted to, the plaintiff may at the expiration of  
 14 days after the exceptions are filed, but not before, *unless in* Motion for.  
*m causes*, refer such answer for insufficiency."

seems to have been the object of the Orders of 1845, to  
 the distinction between injunction causes and other causes,  
 words in Italics are omitted, and the Case of Election only  
 is added as an exception to the general rule. The words of the  
 title of the 16th Order are, "The plaintiff having filed  
 an answer for insufficiency to a defendant's answer, is not to pro-  
 ceed to refer them to the Master before the expiration of  
 14 days from the filing of such exceptions, unless in a case of  
 ."

Reason why the plaintiff was allowed to file exceptions in  
 injunction causes, was because upon showing exceptions  
 he was put upon the terms of obtaining the Master's re-  
 port 14 days from the time when the exceptions were shown  
 (i). The Orders of 1845 not only omit the words which  
 made a distinction between injunction causes and other  
 but they carefully abolish one of the reasons of the dis-  
 tinction; for the 28th Article of the 16th Order directs, that  
 "The plaintiff having shown exceptions to a defendant's answer  
 for insufficiency, as cause against dissolving an injunction, is to  
 refer the Master's report within four days after the date of the  
 order referring them." The four days have therefore now to be  
 reckoned, not from the time when the exceptions were shown as  
 before, but from the date of the order of reference, so that a refer-  
 rant, is not now necessary, to enable the plaintiff to ob-  
 tain his report in the required time.

In the case of *Hughes v. Thomas* (1), the plaintiff showed ex-  
 ceptions as cause against dissolving an injunction, and the question  
 whether they should be referred *instantly*, notwithstanding  
 the Orders of 1845. The judgment of Sir J. L. Knight Bruce. V.  
 was worded as to be scarcely a decision upon the point; but  
 in the case it may be inferred that the old practice will continue  
 unless exceptions are shown for cause, and that in such a case the  
 court will be made for referring them *instantly*, notwithstanding  
 the Orders of 1845. It is, however, impossible to predict whether,  
 in other instances (k) in which there was a distinction be-

*Ex parte Davenport*, 8 Sim. 558, for another instance, where, in  
 an injunction case, the exceptions  
*Brooks v. Haigh*, 8 Sim. might be referred *instantly*.

- Motion for.** tween injunction causes and other causes, the practice not be governed by the general language of the last-mentioned orders.
- When shown as cause against the dissolution of an injunction.** But in a case of *Hughes v. Thomas* (y), where for insufficiency were shown as cause against the dissolution of an injunction, Sir J. L. Knight Bruce, V. C., held, after consulting with the Master of the Rolls upon this subject, that the order should be made for referring the exceptions *instantly*, in the manner as it used to be before the Orders of May, 1845. In a case of this kind it is to be observed, that the order for the exceptions is made by the Court, in the presence of the parties; and it is for the benefit of the defendant, against whom the injunction is maintained, that the question of the insufficiency of the answer should be determined as soon as possible. It follows from this case, that when an answer is put in so as to prevent an injunction, the plaintiff is allowed, as of course, to obtain an order to refer exceptions *instantly* (1).
- When an answer preventing an injunction is excepted to.** If the answer is reported to be insufficient, the plaintiff may move for the common injunction for want of an answer, and for it will be made accordingly, upon the usual application. The defendant, however, may deprive the plaintiff of the benefit, by putting in a further answer before the Master of the Rolls; and then, when exceptions are taken, and the question depends on the report, there will be, as hitherto, a kind of race to be run between the plaintiff seeking to obtain his order before the defendant put in his further answer, and the defendant seeking to put in his further answer before the plaintiff has obtained his order.
- If allowed, injunction may be moved for.** The order for the injunction having been obtained, and entered, the plaintiff's solicitor may prepare the writ, which is sealed by the Clerk of Records and Writs.
- Secus, where further answer has been put in.** It is to be observed, that as an injunction takes effect from the date of the order, and not from the time of sealing the writ, it may, in many cases, be desirable to serve the party
- Order for injunction.**
- In what cases to be served.**

(y) Before Sir J. L. Knight Bruce, V. C., 24th Nov. 1845; 2 Coll. 239. (z) *Ibid.*; *Wynne v. J. & S.* 226; *Ingham v. Ingham* 363.  
(z) *Knox v. Symonds*, 1 Ves. 87.

(1) See *Livingston v. Livingston*, 4 Paige, 111; *Smith v. Thos. & Bat.* 126; *Satterlee v. Bargy*, 3 Paige, 142; *Salmon v. Bland*, 125; *Noble v. Wilson*, 1 Paige, 164.

orney or agent, with the order, without waiting for the writ (*a*), where it has been pronounced before the action at Law has been commenced or the declaration delivered; in either of which cases, we shall see presently (*b*), the injunction will operate to stay *ial* without further order.

Form of.

The common writ of injunction is in the nature of a letter from the Sovereign under the Great Seal of Great Britain, addressed to the defendant, his Counsellors, Attornies, Solicitors, and Agents, and is in the following form (*c*):—

Form of injunction (1).

Victoria, &c. To C. D., his Counsellors, Attornies, Solicitors, and Agents, and every of them, greeting: Whereas it hath been represented unto us in our Court of Chancery, on the part of A. B., complainant, that he hath lately exhibited his Bill of Complaint unto our said Court of Chancery, against you the said C. D., defendant, to be relieved touching the matters therein contained; and that you, the said defendant, being sued with a writ issuing out of our said Court, commanding you to appear to and answer the said Bill, have not obeyed the same, [but are in contempt to an attachment for not appearing to and answering the said Bill,] *rr to which bill you appeared, but for delay have put in an insufficient answer, [or have not put in your answer within the time limited for that purpose by the said Court,]* and yet, in the mean time, you unjustly, as is alleged, prosecute the said complainant at Law touching the matters in the said Bill complained of: We, therefore, in consideration of the premises, do strictly enjoin and command you, the said C. D., and all and every the persons before mentioned, under the penalty of two hundred pounds, to be levied on your and every of your lands, goods, and chattels, to our use, that you and every of you do absolutely desist from all further proceedings at Law against the said complainant touching any of the matters in the said Bill complained of, until you, the said defendant, shall have fully answered the said Bill, [cleared your con-

(a) *Rattray v. Bishop*, 3 Mad. 220.

(b) *Post*, 1818.

(c) *Veal's Record and Writ Practice*, 85.

(1) A writ of injunction ought to be sufficiently explicit upon its face to apprise the party, upon whom it is served, as to what he is restrained from doing; without the necessity of his resorting to the plaintiff's bill to ascertain what the injunction means. *Sullivan v. Judah*, 4 Paige, 444; *Moat v. Holbien*, 2 Edw. 188.

It should be clear and explicit in its terms, and should not deprive the defendant of any right which the case made by the bill does not require he should be restrained from exercising. *Laurie v. Laurie*, 9 Paige, 234.



Service of. tempt (*d*),] and our said Court shall make other order to the contrary; but, nevertheless, the said defendant is at liberty to call for a plea, and to proceed to trial thereon, and, for want of a plea, enter up judgment: but execution is hereby stayed. Witness Ourself, at Westminster, this — day of —, in the — year of our reign.

LANGDALE.

Service of, must be personal.

The writ having been obtained must be *personally served* upon the party, and upon his attorney or agent, by delivering to each leaving with each of them a correct copy of the injunction, and at the same time showing him the original writ under seal (*e*).

The clerk in Court was formerly, and the solicitor is now the agent of the party to receive notice of proceedings in the cause, but an injunction is extraneous to the cause, and not a proceeding in it; and, therefore, must be served either on the defendant personally, or on some person who by an order of the Court has been substituted for the defendant (*f*).

*Secus*, where substituted service of subpoena has been ordered.

If the party himself is abroad, and substituted service of a subpoena upon his attorney-at-law has been ordered (*g*), the injunction may be served upon the attorney-at-law, or on the agent only, but the service upon him must be personal.

Waiver of irregularity in order.

Where an injunction has issued *irregularly*, the defendant is entitled to have the order discharged; but any act of his, founded upon it, is a waiver of the irregularity (*h*), and it has, accordingly, been determined that a defect in the injunction will be cured by the defendant putting in his answer and moving to dissolve (*i*) (1).

Effect of common injunction.

The effect of a common injunction depends on the state of the proceedings at Law;—if the injunction be obtained before a declaration has been delivered, it restrains all proceedings. If the terms of the common injunction, which leave the defendant at liberty to call for a plea, have only a reference to a person supposed to be in a condition to demand it; and, therefore, the injunction

Where obtained before declaration;

(*d*) If the defendant is not in contempt, these words are not inserted. in Ch. 203.

(*e*) 1 Turn. & V. 965. It seems that the person serving the writ, although obliged to produce it to the party served, is not obliged to deliver the writ to be compared with the copy served. Woodward v. King, 2 Ca. 400. (*f*) Goosman v. Dan, 10 B 517; Kirkman v. Honnor, 6 B 400.

(*g*) Ante, p. 502.

(*h*) Eden on Inj. 88; Travers Lord Stafford, 2 Ves. 20, 22.

(*i*) Davile v. Peacock, Barnard.

(1) Parker v. Williams, 4 Paige, 439.

delivery of a declaration, and, *a fortiori*, any further step in the action, would be treated as a breach of the injunction (*k*). If, however, the plaintiff at Law has actually delivered his declaration, he is then permitted, by the express words of the order, to call for a plea and to proceed to trial, or, for want of a plea, to enter up judgment; wherefore, in that case, he may proceed so far that he may be in a situation, immediately that the injunction shall be dissolved, to take out execution, for that is the only step in the action which the Court intends to stop (*l*). But, as the plaintiff at Law is thus left at liberty to proceed to trial, it is obvious that the plaintiff in Equity would have but very inadequate relief, if he could only obtain the common injunction, when his defence to the action depends upon facts which rest within the knowledge of his opponents; therefore the Court will, in such cases, not only restrain the taking out execution, but it will also, where the discovery is material to the defence, extend the injunction to stay the trial until the answer has been put in.

Extension of,  
to stay Trial  
after declaration.

In what cases

To procure this extension, the plaintiff must obtain the common injunction in the first instance, and then move to extend it to stay trial (*m*); and it is to be remarked that the common injunction must have been obtained against the person in whose name the action is brought; therefore, where an action was brought against the plaintiff in the name of an officer of a public company, and the plaintiff filed his bill against the officer and some of the directors, and obtained a common injunction against the directors, an order, which he had obtained from the V. C. of England to extend the injunction to stay trial, was discharged by the Lord Chancellor (*n*).

Application  
for extension,  
cannot be on  
same day;

A motion to extend an injunction to stay trial must be made upon notice, and it is observable that the plaintiff cannot make the motion on the same day that he moves for the common injunction, for want of an answer (*o*). Where, however, the defendant was

must be upon  
notice,

(*k*) *Morrice v. Hankey*, 3 P. Wms. 147; *Garlick v. Pearson*, 10 Ves. 451, 2; *Bullen v. Ovey*, 16 Ves. 144; *Mills v. Cobby*, 1 Mer. 3.

it to stay trial, *ib.*; see *vide Hine v. Fiddes*, 2 S. & S. 370.

(*l*) *Morrice v. Hankey*, *ubi supra*; *Sidney v. Hetherington*, 3 P. Wms. 146, n. B.; *Garlick v. Pearson*, *ubi supra*.

(*n*) *Thorpe v. Hughes*, 3 M. & C. 742.

(*m*) *Bailey v. Weston*, 7 Sim. 666. The Court has refused to relax this rule on the ground that the practice of the Courts of Law, as altered in 1834, did not allow sufficient time for the plaintiff to obtain the common injunction and then to move to extend

(*o*) *Wright v. Braine*, 3 Bro. C. C. [Perkins's ed. notes,] 87; *Garlick v. Pearson*, 10 Ves. 450. Where the plaintiff had been prevented from obtaining the common injunction by a demurrer, the arguing of which had been postponed by the defendant, the injunction to stay trial was granted in that instance. *Raphael v. Birdwood*, 3 Mer. 229, n.

Extension of  
to stay Trial.  
supported by  
affidavit.

Form of affi-  
davit.

not refused be-  
cause defen-  
dant must an-  
swer before  
trial,

but will not be  
granted after  
full answer.

— which  
ought to be  
filed the day  
before.

in contempt for want of appearance, the V. C. of England granted the application without notice (*p*).

The plaintiff must support his application by an affidavit (*q*) stating not only that he cannot safely go to trial until the defendant has answered, (for it may be perfectly true that he cannot go safely to trial, either with or without answer,) *but it must show that he verily believes that the answer will furnish a discovery which will assist him at Law, and which is material to his defence in the action* (*r*); though the affidavit need not be particular as to the kind of discovery expected, unless the defendant is stupid (*s*) (*1*). If, however, it appears, upon the whole case taken together, that the plaintiff's allegation that the discovery will be material to his defence at Law cannot be true, the order will be discharged (*t*).

It is no objection to a motion of this nature to say, that the defendant, by the rules of the Court, is bound to answer before the trial takes place, for though he may and ought to put in his answer in due time, yet, if he shuffles, there are no means of knowing when you will be able to get a full answer (*u*). If, however, a full answer is actually put in before the motion is made, it is a sufficient objection to the application; for, as the discovery is thereby obtained, there is no reason why the trial should be stayed any longer (*x*): but the answer to be available, ought to be filed, at the latest, at eight o'clock in the evening before the day for which the notice of motion is given (*y*), otherwise the plaintiff would have no opportunity of seeing whether the answer is sufficient or not (*z*).

(*p*) *Harrison v. Dixon*, 11 Sim. 123.

(*q*) The affidavit must be made by the plaintiff himself, unless a sufficient reason is assigned for its not being so made. *Spalding v. Keely*, 7 Sim. 377; *Scotson v. Gaury*, 1 Hare, 104.

(*r*) *Appleyard v. Seton*, 16 Ves. 223; *Bishton v. Birch*, 2 V. & B. 41; *Earnshaw v. Thornhill*, 18 Ves. 488; *White v. Steinwacks*, 19 Ves. 84; *Eden*, 84; *Barker v. Barr*, 1 Beav. 374.

(*s*) *Farrar v. Lewis*, 2 Dick. 729; *Revet v. Braham*, 2 Bro. C. C. 640.

(*t*) *Thorpe v. Hughes*, 3 M. & C. 742; *White v. Steinwacks*, 19 Ves. 83; *Ashby v. Jackson*, 6 Beav. 336.

(*u*) *Taylor v. Leigh*, 2 J. & W. 388.

(*x*) *Bishton v. Birch*, 2 V. & B. 40.

(*y*) *Whitehouse v. Hickman*, 18 & S. 102; *Munnings v. Adamson*, 1 Sim. 510; *Thompson v. Byron*, 3 Beav. 15.

(*z*) See Sir S. Romilly's argument in *Bishton v. Birch*, 1 V. & B. 366.

(1) *Eden on Injunct.* (2nd Am. ed.) 108 to 112; *Partington v. Hobson*, 16 Sumner's Vesey, 220, note (*a*), and cases cited.

If the bill does not state the situation of the suit at law, no injunction to stay proceedings therein can be granted. *Teller v. Van Deusen*, 3 Paige, 33. See *Melick v. Drake*, 6 Paige, 470; *Dickey v. Craig*, 5 Paige, 293; *Hegeman v. Wilson*, 8 Paige, 29; *Baker v. Curtis*, 2 Edw. 111.

The answer must also be sufficient, otherwise it is no answer; Extension of, to stay Trial. and where the defendant, upon exceptions taken, had submitted to answer them, the order extending the injunction was made (a). Secus, where answer is insufficient. In the case of *Scotson v. Gaury* (b), it was contended that the Court would, when an answer had been filed just in time to prevent the motion, itself look into it to see whether it was substantially insufficient. Sir J. Wigram, V. C. however refused to adopt his practice. Afterwards, when the answer was found to be insufficient, upon exceptions regularly filed, he refused to extend the injunction to stay trial in consequence of the delay of the plaintiff; but, previously to doing so, he looked into the answer and the exceptions, for the plaintiff's benefit, to see whether the answer was not only insufficient but evasive. The Court will not look into the answer, to see whether it is sufficient.

Where, after an answer reported insufficient, the plaintiff obtained the usual order for leave to amend, and for the defendant to answer the amendments and exceptions at the same time, and amended the bill accordingly, an order, subsequently obtained, to extend the injunction to stay trial, was held to be regular (c). Where plaintiff has amended his bill under an order upon an allowance of exception.

If the plaintiff has been guilty of great delay in applying to extend the injunction to stay trial, or if he postpones it till the assizes are just coming on, the Court will look very anxiously to see how the delay is accounted for before it will grant the extension; indeed it will generally refuse it, because when the cause is ready to be heard, and the evidence is prepared, and the witnesses are in attendance, the injunction could not be granted without putting the other party to considerable inconvenience and expense (d). Not granted after great delay, — or just before the assizes.

The order to extend an injunction to stay trial must be drawn up, passed, and served in the usual way. Order for,

It may here be noticed, that an order for extending the common injunction to stay trial, falls with the injunction, and requires no separate order for its discharge, nor need it be mentioned in the order to dissolve the injunction. — falls with the injunction.

An order of this nature, however, cannot be discharged upon the coming in of the answer, separately from the injunction (e). and requires no substantive order to discharge it. Upon an application being made for this purpose, it was contended that this was a distinct substantive order, obtained upon affidavit, and that the plaintiff having gained the discovery he sought, ought not to refuse to go to trial; but Lord Eldon observed, that

(a) *Ibid.*  
 (b) 1 Hare, 99.  
 (c) *Simes v. Duff*, 8 Sim. 270.  
 (d) *Blacoe v. Wilkinson*, 13 Ves. 54; *Field v. Beaumont*, 1 Swanst.  
 209; 3 Mad. 102, S. C.; *Thorpe v. Hughes*, 3 M. & C. 742; *Scotson v. Gaury*, 1 Hare, 99; *Stoke v. Wilson*, 12 Sim. 91.  
 (e) *Eden on Injunctions*, 93.

**How dissolved** the order, with reference to the future progress of the cause, put the plaintiff at Law in precisely the same situation as if the bill had been filed before the action commenced; that the practice ought to be kept whole; that it might be just as inconvenient not to be permitted to commence an action, as to be restrained from proceeding in it; and that, as in the one case, the plaintiff at Law was not at liberty to commence, so, in the present case, he ought not to be permitted to proceed to trial, until the sufficiency of the answer was proved in the usual way, viz., by the order nisi, subject to showing exceptions for cause, or cause upon the merits (*f*):—in a subsequent case he expressed a similar opinion (*g*).

In these cases, his Lordship laid great stress upon the circumstance that, among the numerous cases that had occurred of injunctions extended to stay trial, he did not recollect, either in the books or in practice, a single instance of an application to dissolve an injunction, so far as it restrained the trial, distinct from an application to dissolve it generally (*h*). It seems, however, that where a *special* injunction has been granted, *after answer*, restraining the defendant from proceeding to trial *till the further order of the Court*, there can be no objection to the injunction being dissolved, so far as it extends to stay trial only (*i*).

**Application to dissolve.** As the common injunction is to continue *until answer in further order*, the defendant must put in his answer before he can apply to dissolve it. When he has filed it, he may then obtain an order nisi for that purpose.

**Order nisi upon.**

**May be obtained upon petition.**

The 23rd Order of 1828, directs, "That the order nisi for dissolving the common injunction may be obtained upon petition, as well as by motion, and that every such order be served, two clear days at least, before the day upon which cause is to be shown

(*f*) *Earnshaw v. Thornhill*, 18 Ves. 485.

(*g*) *Bishton v. Birch*, 2 V. & B. 40.

(*h*) There is one case, however, which has been cited for another purpose from the Registrar's book, in which such an application appears to have been granted. The plaintiffs had obtained the common injunction on the 3rd of February, 1738, which was a Saturday; the defendant not having put in his answer, they moved to extend the injunction to stay trial, but the defendant's counsel stating that the answer would be put in on Monday, the Court made no order. On the 6th of February, the answer not having been put in, the plaintiffs renewed the motion, which

was granted. On the 12th, the defendant having put in his answer, moved to discharge that order only, which, upon hearing the plaintiff's counsel, and the defendant's answer read, was discharged accordingly, *Royal Exchange Assurance v. Barker*, 1 V. & B. 367. And, in a recent case of account, where the defendant being of unsound mind, the answer was put in by a guardian, who was unable to give a full discovery, a common injunction was dissolved upon showing cause so far only as it extended to stay trial, *Barrett v. Tickell*, Jac. 154.

(*i*) *Raphael v. Birdwood*. 1 Swann 228.

dissolving the injunction." As, therefore, the order *nisi* How dissolved  
 r be obtained upon petition of course, the plaintiff is not  
 erly (*k*) delayed during vacations and days when the Courts  
 sitting (*l*).

e recent case of *Lane v. Barton* (*m*), Lord Lyndhurst held  
 h the order *nisi* to dissolve an injunction, and the order ab-  
 might be regularly obtained during the vacation. And this  
 1 seems more necessary now, since under the Orders of  
 345, an injunction may be obtained during the vacation by  
 1 of course. The terms in which the Order is drawn up  
 that the injunction shall be dissolved, unless the plaintiff, on  
 day, shall show good cause to the contrary; and the ground  
 ch the order is made is, that the plaintiff may have time to  
 to the answer to see whether it is sufficient or not, for,  
 seeing the answer, he determines in what way he shall  
 (*n*).

order *nisi* to dissolve an injunction cannot be obtained un- Not till after  
 defendant has put in a full answer to the plaintiff's bill and full answer.  
 his equity. Consequently it cannot be obtained by a de-  
 t who has filed a plea (*o*), nor after exceptions have been  
 to the answer (*p*); neither can it be obtained pending a  
 for the production of documents (*q*).

ay be mentioned, in this place, that, in general, where Cannot be ob-  
 re several defendants injoined, the Court will not dissolve tained till all  
 nction till all have answered (*r*) (1). An instance of ex- the defendants  
 to this rule, however, is afforded in the case of a bill have an-  
 t against a trustee and his *cestui que trust*, which the trust- swered.  
 not answer; in such case, it seems, the Court will dissolve

harp v. Aston, 2 V. & B. 417. (p) *Howes v. Howes*, 1 Beav. 197.  
 nte, p. 1803. (q) *Storer v. Jackson*, 12 Sim. 507.

l Ph. 363; see ante, p. 1812. (r) *Prac. Reg.* 234; *Boheme v.*

acy v. Hornby, 2 V. & B. Porter, Barnard. 352; *Rowcroft v.*  
 Donaldson, 1 Fowl. Ech. Pr. 286.

*Free v. Clayton*, 10 Sim. 185.

is a general rule, that the injunction will not be dissolved, upon an-  
 til the answers of all the defendants are put in; though to this rule  
 e exceptions. *Jones v. Magill*, 1 Bland, 190; *Stewart v. Barry*, ib.  
*Williams v. Hall*, ib. 194; *Chapline v. Betty*, ib. 197; *Tony v. Oliver*, ib.  
 us the answers of all the defendants will not be considered necessary,  
 who have not answered are mere formal parties. *Higgins v. Wood-*  
*Hopk.* 342. See also *Coleman v. Gage*, 1 Clarke, 296; *Wakeman*  
*py*, 5 Paige, 112; *Depeyster v. Graves*, 2 John. Ch. 148; *Noble v.*  
 1 Paige, 164; *Vandervoort v. Williams*, 1 Clarke, 377; *Jones v.*  
 1 Bland, 190; *Cape Sable Co. Case*, 3 Bland, 606.

the defendant against whom the gravamen of the charges rests has  
 swered the plaintiff's bill, the injunction will be dissolved, although  
 defendants have not answered. *Vliet v. Lowmason*, 1 Green Ch.

How dissolved the injunction on the application of the *cestui que trust* (s). It seems that in a case where the bill was filed by a trustee and *cestui que trust*, to restrain an action brought by the former in the name of the latter, the V. C. of England allowed a special motion to dissolve it without there having been a previous order *nisi* (t); but it is doubtful whether this exception to the general rule will hereafter be recognized (u).

*Secus*, where a mere trustee refuses to answer.

Another instance of exception to this rule is afforded by the decision of Lord Eldon, in *Joseph v. Doubleday* (x). In that case an injunction had been obtained to restrain several defendants, consisting of the assignees of some bankrupt partners, and the partners remaining solvent, from proceeding at Law upon a verdict which they had obtained. The solvent partners having put in their answer, had not obtained the common order *nisi*, although the other defendants had answered. Lord Eldon was of opinion that cases might exist, where the circumstance of some of the defendants not having put in their answer, would not be a sufficient ground against dissolving the injunction. His Lordship, however, did not determine it then, as exceptions were taken to the answer. The solvent partners afterwards put in a further answer and the assignees put in their answer, to which exceptions were taken. The solvent partners afterwards obtained an order *nisi* to dissolve the injunction *only as against them*, which was made absolute; they then obtained an order *nisi* for dissolving the injunction against *all the defendants*, although the assignees had not put in their further answer to the exceptions, and Lord Eldon, upon the motion to make that order absolute, declared his opinion that it was competent for the solvent partners to make this motion, but that the injunction could not be dissolved pending the exceptions to the answer of the assignees.

From the case of *Glascott v. the Copper Mines Company* (z), it appears, that where officers of a corporation are made co-defendants to a bill for discovery, and an injunction against the corporation, the injunction will be dissolved upon the coming in of the answer of the corporation, although the officers have not answered.

(s) Lord Delvin *v. Smyth*, Mos. 354. In the case referred to, the application to dissolve the injunction was made by the *cestui que trust*, although he was no party to the suit, and the order appears to have been justified by the collusion which exist-

ed between the trustee and the plaintiff.

(t) *Sharpley v. Perring*, 8 Sim. 600.

(u) *Bordinare v. Wadson*, 1 Col. 432.

(x) 1 V. & B. 497.

(z) 11 Sim. 314.

It is said that the order *nisi* for dissolving an injunction may be made absolute notwithstanding the plaintiff has become bankrupt (a), but as the bankruptcy of a plaintiff, if it does not cause abatement, at any rate renders the suit defective, and prevents the plaintiff proceeding (b), it seems doubtful whether a motion to make an order for dissolving an injunction absolute, can be made in such a case, till after the assignees have been brought before the Court.

How dissolved  
Order nisi  
cannot be  
made absolute  
after bank-  
ruptcy of  
plaintiff.

The order *nisi* must be drawn up, entered, and served on the plaintiff's solicitor; and if, on the day appointed to show cause, no cause is shown, the injunction will be dissolved of course on motion and production of an affidavit of service of the order *nisi* (c). The time within which cause is to be shown is generally four days, but the plaintiff is usually indulged with a short time, upon his undertaking not to except, but to show cause upon the merits (d).

How made ab-  
solute.

The reason why this is an order *nisi*, is, not that the plaintiff may have time generally, but merely that he may have time to look into the answer and consider whether he will take exceptions or show cause upon the merits. It has, therefore, been decided, that where exceptions have been taken and the answer has been found sufficient, it is not necessary *again* to obtain the order *nisi*; the defendant may then move to dissolve the injunction absolutely in the first instance; as it is plain, from his taking the exceptions, that he has already obtained the necessary information (e). In *Bishton v. Birch* (f) Lord Eldon considered the plaintiff, who had taken exceptions, as having precluded himself from the benefit of the order *nisi*.

Need not be  
renewed after  
answer report-  
ed sufficient.

If a plea is ordered to stand for an answer, with liberty to except, the defendant cannot move to dissolve the injunction *absolutely*; he can only move, as upon coming in of an answer, that it may be dissolved *nisi* (g). But, if a plea is *allowed*, he may move to dissolve absolutely in the first instance (h).

Necessary  
where plea has  
been ordered  
to stand for  
answer.

Secus where  
plea is allowed.

When the defendant moves to make the order *nisi*, to dissolve the injunction absolute, the plaintiff may show for cause against dissolving the injunction, — 1st, That he has referred it for impertinence; 2nd, That he has taken exceptions to it for insufficiency; or, 3rdly, That there is sufficient equity disclosed by the answer to induce the Court to continue it till the hearing; which

What cause  
may be shown  
against dis-  
solving.

(a) Anon. 1 Atk. 262.

(b) Vide ante, p. 957.

(c) Harr. Pr. 547.

(d) Vide post, next page.

(e) *Lacy v. Hornby*, 2 V. & B.

291.

(f) 2 V. & B. 44.

(g) *Osborn v. Cowper*, Mos. 198.

(h) *Phillips v. Langhorn*, cited 2

*Dick*. 537; et vide post, p. 1831.



**Cause against Dissolving.** is called "*showing cause upon the merits.*" The plaintiff also avail himself of the opportunity afforded by the moving to make the order for dissolving the injunction to show that the case is one of those which falls within the exception already referred to.

**Reference for impertinence.** 1. The course of proceeding necessary to entitle the plaintiff to show a reference for impertinence as cause against an injunction, and the consequence of such a reference, have been already pointed out (*k*).

**Exceptions for insufficiency.** 2. The practitioner has also been made acquainted with the effect of exceptions for insufficiency upon a motion to dissolve. It is important that, before he determines to show cause against dissolving the injunction, he should recollect that he cannot afterwards show cause upon the merits, nor can he show the injunction upon merits confessed in the same answer.

**Merits confessed in the answer.** 3. If the plaintiff intends to show cause on its merits, he must not indulge him with time for that purpose, until the time for motions.

**Exceptions cannot be shown for cause after time granted.** It is to be observed, that an extension of time for showing cause against dissolving an injunction, is only granted upon the plaintiff's undertaking to show cause upon the merits. That, after such an enlargement of time, the plaintiff cannot afterwards show exceptions for cause (*o*).

**Cause upon merits, how shown.** When the time comes for showing cause upon the merits, the plaintiff's counsel commences the discussion, after which the defendant's counsel is answered by the counsel for the defendant; and after both parties' counsel have been heard, the counsel for the plaintiff is entitled to a reply.

**Upon showing cause, nothing can be read in opposition to answer.** In showing cause against dissolving the injunction, it is a general rule that nothing can be read in opposition to what is shown on the face of the answer (*l*); accordingly, the case of *Isaac*

(*k*) Ante, p. 876.

(*n*) *Stanley v. Bond*, 10

(*l*) Ante, p. 1816 and 890.

(*o*) *Pinheiro v. Porto*, 10

(*m*) *Peyto v. Hudson*, 3 Swanst. 362, n.

363, n.

(1) In *Poor v. Carleton*, 3 Sumner, 73, 74, it is remarked by Story, that in the case of the common injunction issued against a party for not appearing, or for not answering the bill at the time prescribed by the practice of the Court, which usually occurs in bills to stay proceedings at law, it is of course to dissolve such an injunction, if the answer shows the whole merits, and the plaintiff will not be permitted to read in opposition to the answer, upon the motion to dissolve the injunction.

But in cases of special injunctions, there are two points which are established in practice; first, that the dissolution of the injunction is not a course upon the coming in of the answer, denying the merits;

ge (p), in which Mr. Justice Buller (upon an application after answer for an injunction to restrain execution on a verdict) permitted affidavits to be read in contradiction to the answer, has been since repeatedly overruled (q): and it has been established that, except in the case of waste (1) to which the facts in *Isaac v. Humphage* were erroneously assimilated, affidavits will not be received in contradiction to assertions positively made by the answer (s). It is to be remarked, however, that the answer is only evidence as to facts to which other testimony could be received, and therefore an answer, which alleged that the true intention of the parties to a written agreement was contrary to what appeared on the face of it, was not admitted (t). Moreover, even if the answer does state sufficient facts for maintaining the injunction, the plaintiff will not be entitled to avail himself of them, unless he has put them upon his bill and adopted them as his case (u).

Cause against Dissolving.

Answer is only evidence as to facts to which other testimony admissible.

It is stated by Lord Eldon, in *Morgan v. Goode* (x), that the Court, in former instances, had admitted affidavits to be read in support of allegations made by the bill, where those allegations related to acts of the parties, and the defendant, by his answer, had

Affidavits not permitted.

- (p) 1 Ves. J. 437; 3 Bro. C. C. *Berkeley v. Brymer*, 9 Ves. 355; 3. *Norway v. Rowe*, 19 Ves. 148.  
 (q) *Eden on Injunctions*, 108. (t) *Bott v. Birch*, 4 Madd. 255.  
 (s) *Lane v. Williams*, 6 Ves. 798; (u) *Cresy v. Beavan*, 13 Sim. 99.  
*anson v. Gardiner*, 7 Ves. 308; (x) 3 Mer. 10.

, that upon the motion to dissolve such an injunction, the plaintiff, under the circumstances, is entitled to read affidavits in contradiction to the answer, not indeed to all points, but to many points." "If the whole merits are satisfactorily denied by the answer, the injunction is ordinarily dissolved. But there are exceptions to the doctrine, and these, for the most part, are truly resolvable into the principle of irreparable mischief; such as cases of asserted waste, or of asserted mismanagement in partnership concerns, or of asserted violation of copy-rights, or of patent rights. In cases of this sort, the Court will look into the whole circumstances, and will continue or dissolve the injunction in the exercise of a sound discretion. See also *Moore v. Hylton*, Dev. Eq. 429; *Bank of Monroe v. Schermerhorn*, 1 Clarke, 303; *Ing v. Oliver*, 1 Bland, 199; *Williams v. Hall*, ib. 195; *Hollister v. Barker*, 9 N. Hamp. 230; *Village of Seneca Falls v. Matthews*, 9 Paige, 504.

(1) It is now quite settled, and has long been settled, that affidavits may be read against the answer in cases of waste. See *Robinson v. Lord Byron*, Bro. C. C. (Perkins's ed.) 589, note (3); *Merwin v. Smith*, 1 Green Ch. 2. See also *Isaac v. Humphage*, 1 Sumner's Vesey, 427 and note (a); *anson v. Gardiner*, 7 Sumner's Vesey, 305b, note (a).

The policy of preventing irreparable mischief has introduced this exception to the rule respecting reading affidavits in opposition to the answer, in cases of waste, or of mischief analogous to waste, but this exception does not extend to questions of title. 1 *Smith Ch. Pr.* (2nd Am. ed.) 596, 600, 1, notes; *Eden on Injunc.* (2nd Am. ed.) 136, 137, 383, 384; *Eastburn v. Ark*, 1 John. Ch. 444. See the doubt as to this point respecting the question of title. *Poor v. Carleton*, 3 Sumner, 80, 81.

**Cause against Dissolving.** neither admitted nor denied the truth of them (1). The practice, however, appears to have been laid down too generally, and in a

— except for the purpose of verifying documents. subsequent case (y), his Lordship said—“ he did not recollect that the exception to the rule, as to affidavits, had been carried further than this — *that if deeds or letters be stated in the bill, and the defendant says he does not know whether the statement is correct or not, then you may verify them by affidavit (z)* ; but as to facts which the defendants do not know of, you cannot have the benefit of them all, except so far as you may be able to prove them at the trial.” And this appears to be the present practice of the Court; for in the case of *Castellain v. Blumenthal (a)*, where the plaintiff’s counsel, upon showing merits confessed in the answer, as cause against dissolving an injunction, tendered an affidavit to substantiate certain allegations in the bill, as to which the defendant stated in his answer, that he was ignorant, the V. C. of England refused to receive it, saying that the point was quite settled.

**So also where plaintiff moves for an injunction.** The same rule applies, where the plaintiff instead of showing cause against the dissolution of an injunction, has to make a substantive motion after answer for an injunction (b).

**Answer of a co-defendant read where referred to.** Where a defendant refers, by his answer, to the answer of a co-defendant, it may be read against him upon a motion for an injunction (c) ; so also, when a defendant in his answer refers to pleadings at Law, but for greater certainty refers to a copy of them when produced, the plaintiff may, upon a motion for an injunction, read the whole of such pleadings from a copy verified by affidavit (d).

**Where continued till hearing,** Where the merits of the plaintiff’s bill have been so far confessed, by the answer, as to render it proper for the Court to sustain the injunction, it will be continued to the hearing ; but an injunction is never continued to the hearing as a *matter of course*. It was in one case contended, before Lord Hardwicke, that if there

(y) *Barrett v. Tickell*, Jac. 615.

(z) Vide *Hodgson v. Dean*, 2 S. & S. 221; and *Taggart v. Hewlett*, 1 Mer. 499, in which Lord Eldon said that, according to the old practice, the plaintiff might have left these letters in the hands of his clerk in Court, and have called upon the defendant by his bill, to inspect them before he put in his answer, and then to say

whether they were of the testator’s handwriting or not, but that the modern practice was to allow documents of this sort to be verified by affidavit.

(a) 12 Sim. 47.

(b) *Clapham v. White*, 8 Ves. 35; *Barwell v. Barwell*, 5 Beav. 373.

(c) *Anon.* 1 P. Wms. 311.

(d) *Rawson v. Samuel*, 4 M. & C. 330.

(1) See *Poor v. Carleton*, 3 Sumner, 78 to 83; post, 1832, note.

such a doubt, that the Court may, at the hearing, decree either way or the other, it is a reason to continue the injunction till hearing; his Lordship, however, overruled this argument without any hesitation (*e*).

Cause against Dissolving.

There are many cases, however, in which the Court will only continue the injunction upon the condition of the plaintiff paying a certain sum of money into Court; as, for instance, where there has been a verdict at Law (*f*), or an award for a sum of money (*g*), or where the defendant has sworn, by his answer, that a sum of money is due to him (*h*).

upon payment of money into Court.

The old practice, in these cases, was, that the Court always dissolved the injunction, or refused it where not already obtained, unless the defendant gave a judgment at Law for the money sworn for, and a release of errors (*i*); though in one case, Lord Keeper North is represented as objecting to this as not sufficiently beneficial to the defendant; since notwithstanding the release of errors, the plaintiff might bring his writ of error, and put the defendant to plead his release, and so cause delay (*k*). The usual mode, however, at present, is, to order the money to be paid into Court, for which reasonable time will be given, according to the greatness of the sum, or the distance of the party; this, however, will not be done where there is matter confessed in the answer sufficient for a total relief (*l*); and, in general, the practice is confined to cases where the money has either been found due by verdict or award, or is sworn to be so by the answer (*m*).

Old practice.

Modern practice as to bringing money into Court.

In the following case, however, an extension was, from peculiar circumstances, made of the general rule; the plaintiffs, seventy-two in number, who were underwriters, had filed a bill to furnish themselves with defences to actions brought against them on certain policies of insurance, alleging fraud in the assured. Four of the cases had been set down for trial, and in consequence of a mistake by the defendant's attorney, had been tried, and verdicts had been obtained in them for the defendants in Equity. A number of the plaintiffs then paid into the hands of certain persons named in an agreement signed by them, the amount of their several subscriptions in trust, to be applied in satisfaction of whatever judgment was pronounced by the Court of Law. An injunction having been afterwards obtained, for want of the answer of one of the

—extended under circumstances.

(*e*) *Potter v. Chapman*, Amb. 98; *Eden on Injunct.* 112. (*h*) *Prac. Reg.* 238; *Harr. (ed. Newl.)* 549.  
 (*f*) *Prac. Reg.* 237, 240; *Harr. (ed. Newl.)* 550. (*i*) *Prac. Reg.* 240, 242.  
 (*g*) *Prac. Reg.* 242; *Harr. (ed. Newl.)* 549. (*k*) *Anon.* 1 Vern. 120.  
 (*l*) *Toth.* 37.  
 (*m*) *Eden on Injunct.* 113.

Continued till  
Hearing.

Where plain-  
tiff at Law  
is abroad.

— in cases  
of injunctions  
by lessees  
against land-  
lords.

defendants, a motion was made that the injunction might be dissolved, or that such of the plaintiffs as had not deposited the money claimed on the losses subject to the deed of trust, should pay that money into Court within fourteen days, to abide the event of the actions at Law, otherwise the injunction to be dissolved as to them; and this motion was, upon argument, granted (n).

The abuses likely to arise from the facility with which injunctions to stay proceedings at Law were formerly obtained, in cases where the plaintiff at Law was abroad, and consequently unable to appear or answer in time, have long since attracted the attention of the Courts, which have in some measure obviated them, by requiring from the plaintiff in Equity an affidavit of the merits of his case (o). As a still further check to such abuses, a further rule has been adopted, under which, whenever the plaintiff at Law, being abroad, has recovered a verdict, and an injunction has been obtained for want of appearance or answer, an order may be made, upon the application of the defendant, that the plaintiff in Equity shall pay into Court, within a reasonable time (generally a month) the money so recovered, or, in default thereof, that the injunction shall be dissolved (p). This order, however, will not be made without an affidavit in an answer to the material allegations of the bill; and several motions upon this subject have been ordered to stand over, to give the defendants time to file satisfactory affidavits; and though it is stated in the argument of *Culley v. Hickling* (q), that Lord Bathurst granted the motion in *Weskett v. Carnevali* (r), without an affidavit, this appears to have been a mistake (s).

Another very salutary regulation of this nature is provided by the 4 Geo. II. c. 28, s. 3, which enacts, that the lessee or his assignee, or any person claiming under him, shall not have or continue any injunction against the proceeding at Law on an ejectment brought by the lessor; unless, within forty days next after a full and perfect answer filed by such lessor, he shall bring into Court and lodge with the proper officer such sum as the lessor shall swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor on good security, subject to the decree of the Court.

(n) *Kensington v. White*, 3 Pri. 164. *Sherwood v. White*, 1 Bro. C. C. 452; *Acton v. Mark*, 2 Bro. C. C. 14; *Culley v. Hickling*, ib. 182.

(o) Ante, p. 502.

(p) *Weskett v. Carnevali*, 2 Bro. C. C. 182, n.; *Coglan v. Requeneau*, ib.; *Mitchell v. Davis*, cit. ib.; *Potts v. Butler*, ib.; 1 Cox, 330, S. C.;

(q) Ubi supra.

(r) Ubi supra.

(s) Vide *Potts v. Butler*, 1 Cox, 330.

the injunction is continued, the cause in Equity ought to be brought to a hearing; if it be not, and the Court is satisfied that there is any intentional delay on the part of the plaintiff, the injunction will be dissolved (*t*). And, by Lord Bacon's 24th Ordinance is provided, that if no prosecution is had for the space of six months, the injunction shall fall of itself without further

Continued till  
Hearing.

Cause ought  
to be prosecuted  
with diligence.

the ordinary course, however, is to move, at the proper time, for the bill to be dismissed for want of prosecution, to which circumstance of the injunction having been obtained, want of an answer (*x*), or upon the merits (*y*), is no objection. If the plaintiff is showing cause against dissolving an injunction such as will prevent the dismissal of the bill (*z*).

Or bill may be  
dismissed.

If the answer contains a sufficient defence to the case stated in the bill, the injunction will be dissolved (1); so where a plea is

In what cases  
dissolved.

(*sed Newl.*) 548.

Ord. 14.

*Snee*, 3 V. & B. 170.

*nam v. South London*

*Waterworks Company*, 2 Mer. 61;

*Bliss v. Collins*, cited *ib.*

(*z*) *Earl of Warwick v. Duke of*

*Beaufort*, 1 Cox, 111.

If the answer denies the facts on which the plaintiff's equity injunction will be dissolved. *Reid v. Gifford*, 1 Hopk. 416; *Gibson*, 1 Bland, 355; *Hollister v. Barkley*, 9 N. Hamp. 230, 238; *& Ohio Canal Co. v. Baltimore & Ohio Rail Road Co.* 4 Gill Moore *v. Reed*, 1 Ired. Eq. 418; *Livingston v. Livingston*, 4 Wakeman *v. Gillespy*, 5 Paige, 112; *McFarland v. McDowell*, Repos. 110; *Williams v. Berry*, 3 Stew. & Port. 251; *Christie*, 1 Hayw. 123; *Thompson v. Allen*, 2 Hayw. 151; *Parkindale*, 3 Scam. 370. Not, however, unless the denial is positive. *Bokkelin*, 1 Paige, 100; *Wakeman v. Gillespy*, 5 Paige, 112; *Anderson*, 2 John. Ch. 204; *Hollister v. Barkley*, *ubi supra*. A statement of information and belief is not sufficient. *Apthorpe v. Comstock*, 3 Ward *v. Van Bokkelin*, *supra*; *Poor v. Carleton*, 3 Sumner, Bank *v. New York & Sharon Canal Co.* 1 Paige, 311. Nor is an answer sufficient. *Williams v. Hall*, 1 Bland, 195; nor a confession, *Tong v. Oliver*, 1 Bland, 199; nor is the answer sufficient to dissolve an injunction upon bill and answer, that the bill upon which the injunction rests, is not denied by the defendant, if there be an extreme improbability in the defendant's case, *Moore v. Hylton*, 1 Dev. Eq. 429.

The equity of an injunction bill is not charged to be within the facts alleged therein, and the defendant merely denies all knowledge of the facts alleged therein, the injunction will not be dissolved by the answer alone. *Rodgers v. Rodgers*, 1 Paige, 426; *Quackenbush*, 1 Saxton, (N. J.) 476. And it is always a good answer to dissolve an injunction upon bill and answer, that the bill upon which the injunction rests, is not denied by the defendant, if no exceptions have been filed. *Wakeman v. Gillespy*, 5

is sufficient, however, if it disprove the facts stated in the bill. *Moore v. McDowell*, 1 Car. Law Repos. 110. The defendant must show that the evidence of the plaintiff is entitled to no credit. *Row*, 4 Rand. 1. The answer must be sworn to if the defend-

In what Cases  
Dissolved.

allowed, there is ordinarily an end of the injunction, but not always; and the Court has said, that an injunction is not absolutely dissolved upon the allowance of the plea, but only *nisi*, because there may be some equity shown to continue it (a). It is, however, a matter nearly of course to dissolve the injunction, after plea allowed (b). Where a cross bill has been filed, if, when the original bill has been answered, the second is not answered in eight days, the injunction will be dissolved (c).

When revived  
after a refer-  
ence for in-  
sufficiency or  
impertinence.

If an injunction be dissolved, yet if there be cause, it may be revived on motion (e) (1): thus, where a reference of the answer

(a) Prac. Reg. 242.

(b) *Phillips v. Langhorn*, 1 Dick. 148; but where the plea is allowed to stand for an answer, the defendant cannot move to dissolve absolutely, but only *nisi*, ante, p. 1825. We have seen that now, under the 48th Order of May, 1845, upon the allowance of a plea to the whole bill, if the plaintiff does not undertake to reply, the bill is to be dismissed out of Court (ante, 482, 794); in such a case it is presumed that the injunction would be dissolved without motion.

(c) *Hind*, 59; Prac. Reg. 235, 241. There is a case in which an injunction was continued, though the an-

swer stated a full defence; there had been a reference to the Master as to title, upon a bill for a specific performance of an agreement and an injunction to restrain the defendant from proceeding at Law to recover part of the purchase-money paid in advance; the answer stated circumstances which showed that a decree could not be made on the ground of want of title and outstanding incumbrances; the Court, however, refused to dissolve the injunction, without the Master's report, as it would be in effect deciding the cause, *Church v. Legeyt*, 1 Pri. 301.

(e) Prac. Reg. 242.

ant wishes to move to dissolve an injunction upon the bill and answer. *Doughrey v. Topping*, 4 Paige, 94; and this, though the oath is waived, or is otherwise unnecessary, *ib.*; *Manchester v. Day*, 6 Paige, 295.

But an injunction is not dissolved of course, even upon a full denial of the equity of the bill, if the Court can see in the facts disclosed, good reasons for retaining it. *Bank of Monroe v. Schermerhorn*, 1 Clarke, 303; *Hollister v. Barkley*, *ubi supra*; *Shellman v. Scott*, R. M. Charlt. 330, 331; *Sherrill v. Harrell*, 1 Ired. Eq. 194; *Chetwood v. Brittan*, 1 Green Ch. 439.

In *Poor v. Carleton*, 3 Sumner, 75, 76, Mr. Justice Story remarks, "I confess I should be sorry to find, that any such practice had been established, as that a special injunction should, at all events, be dissolved upon the mere denial by the answer of the whole merits of the bill. There are many cases in which such a practice would be most mischievous; nay, might be the cause of irreparable mischief. The true rule seems to me to be, that the question of the dissolution of a special injunction is one which, after the answer comes in, is addressed to the sound discretion of the Court." "Extraordinary circumstances may exist, which will not only justify, but demand the continuation of the special injunction." "I am not satisfied, that the authorities do establish a contrary doctrine. If they did, I should hesitate to follow them in a mere matter of practice, subversive of the very ends of justice." See *Moredock v. Williams*, 1 Tenn. 325; *Hollister v. Barkley*, *ubi supra*; *Shellman v. Scott*, R. M. Charlt. 330, 331; *Parkinson v. Trousdale*, 3 Scam. 370.

(1) Where the dissolution of an injunction has been obtained by fraud, it may be reinstated. *Billingslea v. Gilbert*, 1 Bland, 563. See *Gillian v. Allen*, 1 Rand. 414; *Beal v. Gibson*, 4 Hen. & Munf. 481; *Radford v. Innes*, 1 Hen. & Munf. 8.

or insufficiency has been shown for cause against dissolving the injunction, and the plaintiff has been put upon terms of obtaining the Master's report within a certain time, but, having failed to do so, the injunction is dissolved: if the Master afterwards reports the answer insufficient, the plaintiff may of course, move to revive the injunction (*f*); but, after a reference for impertinence, it seems doubtful whether such a motion can be sustained (*g*).

In what Cases  
Dissolved.

The motion has also been refused, where, the Master having reported in favor of the sufficiency of the answer, exceptions have been taken to his report (*h*); in like manner it has been refused, where the Master of the Rolls, upon exceptions taken to the Master's report, allowing exceptions for insufficiency, had affirmed them, thinking the answer sufficient, and an appeal had been presented against the judgment (*i*). The Court has also refused to revive an injunction which had been dissolved, upon the coming-in of an answer denying all the circumstances of the bill, although a true bill had been found against the defendant for perjury committed in that answer (*k*).

We have already had to consider the effect of an amendment of the bill upon the common injunction, and the privilege conferred upon the plaintiff by the 60th Order of May, 1845, of obtaining one order, as of course, to amend his bill without prejudice to an injunction (*l*).

### SECTION III.

#### *Special Injunctions.*

SPECIAL injunctions are those which are granted, not as a matter of course, but upon the special circumstances of the case, whether such circumstances are disclosed by the answer of the defendant or upon affidavits (*l*). Nature of special injunction.

The granting of special injunctions is discretionary, but they are now granted much more frequently than they were formerly. Not granted except upon bill filed,

(*f*) *Dansey v. Browne*, 4 Mad. 237; ante, 891, and 28th Art. of 16th Order, May, 1845.

(*g*) Ante, 876.

(*h*) Ante, 891; but if the Court allows the exceptions, the injunction

may be revived.

(*i*) *Scott v. Mackintosh*, 1 V. & B. 504.

(*k*) *Clapham v. White*, 8 Ves. 35.

(*l*) Ante, p. 483.

(*l*) Ante, p. 1811.



In what Cases  
granted,  
though not  
prayed by Bill.

nor against  
any one not a  
party to the  
suit.

Secus, after  
a decree in a  
foreclosure  
suit.

And after de-  
cree for the  
administration  
of assets.

Creditor may  
be restrained  
from proceed-  
ing at Law,

ly (m). In earlier times they could be obtained upon petition, but several Orders have been directed against that practice; and it may now be stated, as a general rule, *that injunctions will not be granted except upon a bill filed for the purpose of specifically praying for an injunction* (1), nor against any one who is not a party to the suit (n). The rule, however, is not universal, but is subject to several exceptions; thus, if the Court, having full cognizance of the matter, has, by its decree, taken it into its own hands, it will interfere, by its injunction, to prevent injury to the property either by the parties litigant or others, although there is no injunction prayed by the bill (2). Instances of this occur in cases of foreclosure, in which, if, after a decree to account, the mortgagor attempts to cut timber, the Court will enjoin him, though there was no prayer for an injunction in the bill (o).

Upon the same principle, if there has been a decree for the administration of assets, the Court will restrain a creditor, who is not a party to the suit, from proceeding at law against the testator's or intestate's estate for his own individual debt (3). This it does, because it considers the decree it has made in the nature of a judgment for all the creditors (p), and having taken the fund into its own hands, it will administer it equitably, and not permit the executor to be pursued at law. It was not until the latter end of the last century that this remedy was given, unless where a bill for an injunction had been expressly filed against the creditor whose action was sought to be restrained; but it then began to

(m) Potter v. Chapman, Amb. 99;  
Hanson v. Gardiner, 7 Ves. 307.

(n) Prac. Reg. 231; Dawson v.  
Princeps, 2 Anst. 521; Gadd v. Wor-  
rall, ib. 555; Brown v. Frost, 1 Sugd.  
V. & P. 8th ed. 206.

(o) Wright v. Atkyns, 1 V. & B.  
313, 314.

(p) Martin v. Martin, 1 Ves. 211;  
Bank of England v. Morice, For. 217;  
2 Bro. P. C. 465.

(1) See ante, 447, 448, and notes; Walker v. Devereaux, 4 Paige, 229; Story Eq. Pl. § 41, 42.

The bill or petition asking for an injunction must be sworn to. Where the facts on which the injunction is asked are not within the personal knowledge of the plaintiff, he should state the facts on his own information and belief, and annex the affidavits of the person from whom he obtained the information, or some other person who can swear to the truth of the material allegations in the bill. Campbell v. Morrison, 7 Paige, 157; Bank of Orleans v. Skinner, 9 Paige, 305. See Hammersley v. Wyckoff, 8 Paige, 72.

(2) See Matter of Hemiup, 2 Paige, 319.  
But it is a general rule that an injunction will not be granted against persons who are not parties to the suit. Fellows v. Fellows, 4 John. Ch. 25; Waller v. Harris, 7 Paige, 167.

(3) Thompson v. Brown, 4 John. Ch. 642. See Benson v. Le Roy, ibid. 651.

, that as a decree in Equity could not be pleaded at Law, <sup>In what Cases</sup> Courts of Law do not notice a decree in Equity,) it was <sup>granted,</sup> <sup>though not</sup> <sup>prayed by Bill.</sup> ble, in order to save expense, that the executors, when <sup>at the instance</sup> could be able, upon giving notice to the creditor, to bring <sup>of personal</sup> <sup>representative,</sup> <sup>— of the</sup> <sup>heir of another</sup> <sup>creditor, or of</sup> <sup>residuary leg-</sup> <sup>atees.</sup> by an order made upon motion (*q*).

power is not confined to the executor or administrator, but the injunction will equally be granted on the application of the heir (*r*), or of another creditor (*s*), or of a common legatee, as it seems, of a residuary legatee (*t*). There is no case, however, in which a creditor at Law has ever been granted such a power, unless there was a decree under which he could come, until there is such a decree, the creditor ought not to be deprived of the benefit of a prior judgment (*u*); but when the decree has been made, then, from that moment, it must be preferred if it precedes the judgment in point of time, and all the debts must be paid according to their priorities as they then stand.

Although the rule is, that the Court will interfere to give effect to its own decree, yet it will not interfere to protect an executor from any liability to which he may have, personally, subjected himself; wherefore, if he has put in such a plea at Law as to entitle the creditor to a judgment *de bonis propriis*, or to a judgment *de bonis testatoris et si non de bonis propriis*, the executor will not be restrained (*y*). What will amount to such a plea is not easily to be gathered from the cases, but the principle on which the Court of Chancery acts are fully gone into and explained by Lord Langdale, M. R., in *Lee v. Park* (*z*), and it appears, that all pleas, except a general issue, or *administravit*, would be considered to have that effect.

It may be remarked that, in one case, where the executors had obtained judgment to go by default, Lord Eldon granted an injunction, considering that an executor's suffering judgment to go by default was no more than saying that he was willing to do what the Court of Law or Equity might think proper (*a*): but on

What acts of an executor will deprive him of the protection of this Court.

Effect of allowing judgment to go by default.

*Stanton v. Douglas*, 8 Ves. 520.  
*Martin v. Martin*, ubi supra.  
*Er v. Kearsley*, 2 Mer. 482, n.  
*Stokes v. Reynolds*, 1 Bro. C. 2.  
*Swanst.* 545; and see  
*The Earl of Ormonde*, Jac.

(*z*) *Largan v. Bowen*, 1 Sch. & Lef. 296; *Lee v. Park*, 1 Keen, 724.  
(*y*) *Terrewest v. Featherby*, 2 Mer. 480; *Clarke v. Earl of Ormonde*, Jac. 108; *Lord v. Wormleighton*, ib. 148; *Price v. Evens*, 4 Sim. 514; *Kent v. Pickering*, 5 Sim. 569.

*Wish v. Higgin*, 4 Ves. 637;  
*Werry v. Phelps*, 10 Ves. 34;  
*Ilbot*, 22.

(*z*) 1 Keen, 714.  
(*a*) *Dyer v. Kearsley*, 2 Mer. 482, n.

In what Cases granted, though not prayed by Bill. another occasion, his Lordship intimated that it is the duty of executors to apply at once for an injunction: for he took it to be clear that if, after a decree to account, the executors should let judgment go by default, or should permit the creditor to proceed at Law, they would be responsible; they might indeed be allowed to stand in the place of those creditors against the estate, but they could not do more (b).

Upon what terms injunction will be granted. It may be observed here, that, as the practice of granting injunctions of this description might be liable to much abuse, by a friendly creditor filing a bill and obtaining a decree, it has been laid down as a rule, *that an injunction to restrain a creditor from proceeding at Law after a decree, shall never be granted without an affidavit from the executor as to what assets he has in his hands* (c). The rule, however, is liable to exception where the assets are stated, or the balance is set forth in his answer (d), so as to enable a motion for the payment of it into Court to be made, and then the injunction will be granted upon the terms of the executor's bringing the money into Court, which will make such order as the state of the assets requires (e). It is right to state, in this place, that a creditor, who is restrained by an injunction of this nature, is entitled to his costs at Law, up to the time when he first had notice of the decree (f), but not to the costs subsequently incurred, nor to the costs of the motion (g). It appears to have been stated by the Registrar, in *Drewry v. Machen* (A), to be the usual form to direct the injunction to issue "on payment of costs;" but Lord Eldon said, this was improper; and it seems that, in such cases, the costs of the creditor, up to the time when he had notice of the decree, should be proved as a debt under the decree (i).

Costs of a creditor restrained by injunction.

Injunction in such cases special. It is to be remarked, that this injunction, when granted, is a *special injunction* which restrains the creditor in general terms, not merely from suing on to execution, but from all further proceedings in the action he has brought (k).

In cases of election. The second occasion in which an injunction will be granted without a bill being filed for the express purpose, is where a plain-

(b) *Clarke v. Earl of Ormode*, ubi supra.

(c) *Cleverly v. Cleverly*, cited 8 Ves. 521.

(d) *Gilpin v. Lady Southampton*, 18 Ves. 469.

(e) *Ibid.*

(f) *Paxton v. Douglas*, 8 Ves. 521; *Jackson v. Leaf*, 1 J. & W. 231.

(g) *Cune v. Bowyer*, 3 Mad. 456; Anon. 2 S. & S. 424.

(h) 3 Swanst. 541.

(i) *Goate v. Fryer*, 2 Cox, 202; 3 Bro. C. C. 24.

(k) *Ibid.* *Kenyon v. Worthington*, 2 Dick. 668; *Fenton v. Corral*, 2 Seaton on Decrees, 302.

tiff is proceeding against the defendant, both at Law and in Equity, at the same time, and for the same matter; in such cases, as we have seen (*l*), the defendant has a right, upon putting in his answer to the bill in Chancery, to call upon the plaintiff to elect in which Court he will proceed, and then, if the plaintiff elects to proceed in Equity, the Court will interfere, by injunction, to restrain him from further proceeding at Law (*l*). In what Cases granted.

The remedy given by election also applies to a case where the plaintiff has not proceeded to a decree. After decree, the benefit of the order to elect is lost, because the plaintiff has already made his election, and the decree has decided the question between the parties. But after decree, although under special circumstances, the plaintiff will be permitted to sue the defendant, both under the decree, and also to adopt proceedings against him in other Courts, and in foreign countries; yet the plaintiff ought, before taking such steps, to apply for leave to the Court, and if he proceeds without such leave, the Court will restrain him upon the application of the defendant (*m*).

Another class of cases in which an injunction may be obtained without a bill being filed for that purpose, has been already pointed out as proceeding from the jealousy entertained by the Court of any interference with its process by another tribunal, for which reason the Court will, as we have seen, issue its injunction to restrain an action at Law to recover damages for false imprisonment under process of contempt improperly issued (*n*). Where action has been brought for false imprisonment under irregular process.

With the exceptions above enumerated, the rule is invariably that, before the Court will issue an injunction, a bill must be filed, of which bill a prayer for an injunction must form a part; for, notwithstanding the boasted efficacy of the prayer for general relief, it has, as we have already seen, been determined that an injunction cannot be obtained under that prayer alone (*o*) (*2*). Bill must have a prayer for an injunction.

The various cases in which this Court will interfere by injunction, are almost as numerous as the matters which fall within the equitable jurisdiction of the Court of Chancery; for, whenever a In what cases an injunction not granted.

(*l*) Ante, p. 961.  
 (*m*) Wedderburn v. Wedderburn, 1 Beav. 308.  
 (*n*) Vide ante, 540-1.  
 (*o*) Ante, p. 456-7. It is to be observed, that although a prayer for an injunction in the prayer for process, will be sufficient though not mentioned in the special prayer, yet if the bill prays for the injunction in the prayer for relief, it must do it also in the prayer for process. Wood v. Beadell, 3 Sim. 273.

(1) Rogers v. Vosburgh, 4 John. Ch. 84.

(2) Story Eq. Pl. § 41 and note.

**In what Cases not granted.** plaintiff is entitled to equitable relief, then, if that relief consists in restraining the commission or continuance of some act of the defendant, the Court will enjoin him by means of this prohibitory writ. There are some cases, however, in which an injunction will not be granted, and the consideration of these, in the first place, will clear the way before us for the fuller investigation of the subject.

**Not to restrain proceedings in criminal matters.** It is an established rule that the Courts will grant no injunction, or order in the nature of an injunction, *to stay proceedings in any criminal matter*. "If they did," said Chief Justice Holt, "the Court of Queen's Bench would break it, and protect any that would proceed in contempt of it" (p). Accordingly, in the case of Lord Montague v. Dudman (q), Lord Hardwicke allowed a demurrer to a bill for an injunction to stay proceedings on a *mandamus* issued to compel the Lord of a Manor to hold a Court. "The Court," he said, "has no jurisdiction to grant an injunction to stay proceedings on a *mandamus*, or on an indictment, or an information, or a writ of prohibition." But this restriction applies only to cases where the parties seeking redress by such proceedings are not the plaintiffs in Equity, for, if they are, then they are subject to control by an order personally affecting them; for when parties have submitted their rights to the Court, then the Court has certainly a jurisdiction, and it may interfere.

**When plaintiffs in Equity, are seeking redress by criminal proceedings; as a bill to quiet possession.** If, for instance, a suit were to be instituted to establish a right to land where entries have been made, and the bill should seek to quiet the possession, and after filing the bill the plaintiff should prefer an indictment for a forcible entry, which is of a double nature, as it partakes of a breach of the peace and is also a civil right, "the Court," said Lord Hardwicke, "would certainly stop the proceedings upon such an indictment." Upon this principle his Lordship acted, in *The Mayor of York v. Pilkington* (r), where a bill had been filed to establish a right of fishing, and the plaintiffs in the first cause indicted the agents of the defendants for a breach of the peace in fishing; there an injunction was granted with reference to what was civilly in question between the parties, though it was also the subject of a criminal prosecution; for, while the question of right was depending in Equity, it was but

(p) *Holdernes v. Saunders*, 6 Mod. 19.  
(q) 2 Ves. 396.

(r) 2 Atk. 302; see 2 Ves. 396; and see *Atty.-Gen. v. Cleaver*, 18 Ves. 220.

### *Special Injunctions.*

reasonable that the plaintiff should not proceed by action or indictment until it was determined there (s). In what not granted

It is now, also, settled that there is no jurisdiction in a Court of Equity whereby an injunction may be obtained to stay the process of a Court of Law upon an award which has been made a rule of Court under the statute 9 & 10 Wm. III. c. 15. By that statute it is declared, "That the process of the Court, in which the submission is made a rule, shall not be stopped or delayed in its execution by any order, rule, command, or process of any other Court, either of Law or Equity, unless it shall be made to appear, on oath, to such Court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption or other undue means;" and it has therefore been held, that no Court has jurisdiction to set aside an award under that statute, except the Court in which the submission has been made a rule. Injunction not to be issued to stay proceedings Law under award under the 9 & 10 Wm. III. c. 15

It is to be observed, that, by the second section of the above statute, it is provided "That any arbitration or umpirage procured by corruption or undue means shall be judged and esteemed void and of none effect, and accordingly be set aside by any Court of Law or Equity, so as complaint of such corruption or undue practice be made in the Court where the rule is made for submission to such arbitration or umpirage before the last day of the term next after such arbitration made and published to the parties." Under this section it was contended, that though the application to the Court in which the reference is made, a rule must take place within the time limited, there is no limitation of time to an application to any other Court, and that the jurisdiction of the Court of Chancery, notwithstanding the Act, remained after the time given by the statute expired; but Lord Eldon's opinion was, that in cases where the reference had been made a rule of another Court under the statute, the jurisdiction of this Court was ousted (t).

In the case above referred to, the reference to arbitration had been made a rule of Court before the injunction was applied for; but, in *Dawson v. Sadler* (u), the same principle was acted upon by Sir J. Leach, V. C., where the bill had been actually filed before the injunction was granted. Where bill has been made a rule at Court before submission

(s) These cases do not interfere with the well established rule, that the Court of Chancery has originally no jurisdiction to enjoin or regulate any criminal proceedings; but when the injunction is granted, it is merely incidental to the ordinary power

which it ought to have of imposing terms upon the parties who seek its aid in furtherance of their rights.

(t) *Gwinett v. Bannister*, 14 Ves. 530.

(u) 1 S. & S. 537.

In what Cases  
not granted.

fore the reference had been made a rule of Court, and notice of motion had been given for an injunction to restrain the defendant from making it a rule of another Court, but the defendant succeeded in getting the rule made before the motion came on. In *Nichols v. Roe* (x), however, the V. C. of England held upon demurrer that where the reference had not been made a rule of Court before the bill filed, the jurisdiction of the Court was not taken away; and, upon a subsequent application to dissolve an injunction, which the plaintiff procured to restrain the defendant from taking proceedings upon a rule which he had afterwards obtained, his Honor refused to dissolve it; but, upon appeal, an order to dissolve the injunction was made, by Lord Brougham, after an elaborate analysis of the statute, on the ground that no Court, except the Court in which the submission is to be made a rule, has the power of reviewing the award, and that it makes no difference whether that submission is so made a rule before or after the bill is filed (y).

To relieve  
against judgment at Law  
upon grounds  
which might  
have been  
available at  
Law.

An injunction will not lie to relieve the plaintiff against a judgment at Law, where the case in Equity proceeds upon a ground which was equally available at law, unless the plaintiff can establish some special equitable ground for the relief which he asks (1): accordingly it was held, in *Harrison v. Nettleship* (z), that a plaintiff in Equity who had pleaded a set-off in an action at Law and failed, could not sustain a bill for an account relating to the same transaction as to which he had pleaded the set-off. But if a defence could not have been made available in the Court of Law at the same time or under the circumstances, and there was no *laches* in the party applying, then relief will be granted, and the Court of Chancery will interfere by its injunction (a). So also if a fact, material to the merits, which would render the proceedings upon the judgment inequitable, should be discovered after a trial, which could not, by ordinary diligence, have been ascertained before, relief will be granted (b).

After verdict  
when defendant  
had a  
defence.

These, however, are mere exceptions to the general rule, for the general rule most undoubtedly is, that *Equity will not relieve after*

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| (x) 5 Sim. 156.                               | son v. Lord Howden, 3 M. & C. 97.           |
| (y) <i>Nichols v. Roe</i> , 3 M. & K. 431;    | (a) <i>Farquharson v. Pitcher</i> , 2 Russ. |
| vide etiam <i>Davies v. Getty</i> , 1 S. & S. | 81.                                         |
| 411; and <i>Dawson v. Sadler</i> , ubi sup.   | (b) <i>Jarvis v. Chandler</i> , 1 T. & R.   |
| (z) 2 M. & K. 423; and see <i>Simp-</i>       | 319.                                        |

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(1) See *Stone v. Hobart*, 8 Pick. 464; S. C. 10 Pick. 215.

is verdict where the defendant at Law might probably have defended himself there (c) (1). In what Cases  
not granted.

If, therefore, the defendant in an action at Law submits to go to trial without filing a bill in Equity for discovery of evidence, and after verdict against him, attempts to gain that discovery as a ground for a new trial, with an injunction in the mean time; or, if the facts on which the bill is founded, though discovered since the trial, might have been established at the trial by the cross-examination of a witness, and the party was put upon inquiry;—in either of these cases the Court of Chancery will not give countenance to such a proceeding, for the inattention of parties in a Court of Law can hardly be made the subject of interference in a Court of Equity (d). There may, however, be cases cognizable at Law and also in Equity, in which Equity will sometimes interfere, after matter has been determined in a Court of Law; for instance in a case of complicated account, where the party has not made a defence, because it was impossible for him to do it effectually at Law, or where a verdict has been obtained by fraud (e), or where a party has possessed himself improperly of something by means of which he has acquired an unconscientious advantage which Equity will either put out of the way or restrain him from using.

Excepting, however, in the cases above put, or in cases of the like nature, an injunction will not be granted where the cause has already been decided by the proper tribunal (f); therefore a Court of Equity will not relieve by granting an injunction and staying execution on a judgment, because there has been a mistake in the finding, or in the conduct of the cause (g) (2), or merely to let

Not granted because there has been a mistake in the conduct of the cause.

- (c) *Protheroe v. Forman*, 2 Swanst. 427; 3 Bro. C. C. 463, S. C. 53; and see *Countess of Gainsboro' v. Gifford*, 2 P. Wms. 424. (f) *Bateman v. Willoe*, 1 Sch. & Lef. 204.
- (d) *Ld. Red.* 132; *Semell v. Free-ton*, 1 Ch. Ca. 65; *Taylor v. Shep-ard*, 1 Y. & C. Exch. Rep. 271; *Isaak v. Vernon*, 2 Cox, 12. (g) *Stephenson v. Wilson*, 2 Vern. 325; *Blackhall v. Combs*, 2 P. Wms. 70; *Kemp v. Mackrell*, 2 Ves. 579; *Holworthy v. Mortlock*, 1 Cox, 141.
- (e) *Isaac v. Humpage*, 1 Ves. Jr.

(1) See *Farmer's Bank v. Vanmeter*, 4 Hen. & Munf. 553; *Dodge v. Wroong*, 2 John. Ch. 230; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Woodworth v. Van Buskirk*, 1 John. Ch. 432.

An injunction will not be granted, if the person seeking it could, by proper vigilance, have protected himself from injury by the ordinary means at law. *Albritton v. Bird*, R. M. Charl. 93; *Dodge v. Strong*, supra.

(2) *Farmer's Bank v. Vanmeter*, 4 Rand. 553.



In what Cases in new corroborative evidence, for the jurisdiction does not arise from the circumstances that a party has omitted to make a proper defence (*h*) (1).

Granted upon the ground of error in fact.

Doubtful whether granted for error of law.

It is to be observed here, that an important distinction has frequently been attempted to be drawn between an error or mistake in fact, and an error or mistake in law. With respect to the former, it has been clearly settled, that, where a deed has been executed, or money paid, from ignorance of a fact, or under an erroneous impression respecting it, a Court of Equity will relieve; but there seems to have been some difference upon the question whether it would do so when an act has been done under a mistake of law (*i*). With regard to the cases on this head, in which relief has been given, some of them are attended with circumstances of fraud or circumvention, and others of them lie so much on the borders of the two kinds of errors, that they are to be placed amongst instances of errors of fact rather than errors of law; but, in *Pullen v. Ready* (*k*), Lord Hardwicke intimated, that, parties are entering into an agreement, and have the facts before them, and their counsel choose to construe it, taking upon themselves the knowledge of the law, he would then hold them bound. Lord Eldon has quoted this passage with evident approbation, and, whatever may be the rule generally as to other parties, yet, in family arrangements, it seems to be settled that they will not be disturbed, after a long acquiescence, on the ground that they are founded on a mistake of the parties, or because, in the result, they may turn out to be more advantageous to one party than to the other. We may, therefore, infer, from these cases, that an injunction will not be granted to stay any legal proceedings on the ground that the deed or instrument upon which an action is brought was made under a mistake in point of law (*l*), for *ignorantia juris non excusat*.

In what cases injunctions will be issued. Having pointed out some of the instances in which the Court will *not* interfere by injunction, we will now proceed to the cases in which it will.

- (*h*) *Ware v. Horwood*, 14 Ves. 31. (*k*) *2 Atk.* 591; cited 1 V. & B. 3 P. Wms. 315; (*i*) *Pusey v. Sir Edw. Desbouvrie*, 3 P. Wms. 315; (*l*) *Stockley v. Stockley*, 1 V. & B. 23; *Clifton v. Cockburn*, 3 M. & W. 76; *Neale v. Neale*, 1 Keen, 672. (*j*) *Broderick v. Broderick*, 1 P. Wms. 239; *Cocking v. Pratt*, 1 Ves. 400; *Ramsden v. Hyllton*, 2 Ves. 304; *Bingham v. Bingham*, 1 Ves. 126.

(1) See *Smith v. Lowry*, 1 John. Ch. 320.

An injunction was granted against a judgment at law, grounded on a bill of sale, which was fraudulently obtained. *Crawford v. Crawford*, 4 Desautels 176.

consideration of the cases in which it will exercise that branch of its jurisdiction. In what Cases granted.

The various instances in which an injunction will be granted are almost as numerous as the matters which fall within the equitable jurisdiction of the Court of Chancery, for, whenever a plaintiff is entitled to equitable relief, then, if that relief consists in restraining the continuance or commission of some act, the Court will enjoin it, by means of this prohibitory writ; it will be impossible, therefore, in a Treatise of this nature, to accomplish more than to enumerate, very briefly, the principal purposes for which injunctions will be granted, before we proceed to discuss the different points of practice with regard to them.

Injunctions may be obtained to stay proceedings in other Courts of Justice, whether such Courts are Courts of Law or Equity, or whether they are the Spiritual Courts or the Courts of Admiralty, and even, in some instances, although the Courts may actually be situated in a foreign country. To restrain proceedings in other Courts.

It is a general rule, illustrated by an abundance of cases, that wherever a party (1), by fraud, accident, mistake, or otherwise, has obtained an advantage in proceeding in a Court of ordinary jurisdiction, which must necessarily make that Court an instrument of injustice, a Court of Equity will interfere to prevent a manifest wrong, by restraining the party whose conscience is thus bound, from using the advantage he has there gained (2): thus if by fraud, accident, or mistake, a deed is framed contrary to, or beyond the intention of the parties in their contract on the subject, and the forms of the Courts of Common Law will not admit of such an investigation as will enable them to do justice, the Court of Chancery will restrain the party from asserting his legal rights under the instrument in those points in which it is so framed, until it has investigated the question; when, if the complaint be well founded, it will either rectify the instrument in the points complained of, or permanently restrict the party from making use of it (m). There are also many other cases in which the legal

(m) See Lord Red. 103; Eden on Injunctions, p. 4 to 14.

(1) No person can enjoin a judgment at law to which he is not a party; but if he is aggrieved, he should pray an injunction to the execution. *Jordan v. Williams*, 3 Rand. 501.

(2) See *Mosby v. Haskins*, 4 Hen. & Munf. 427; *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332; *Glenn v. Fowler*, 8 Gill & John. 340; *Emerson v. Udall*, 13 Vermont, 477; *Briggs v. Shaw*, 15 Vermont, 78.

To restrain  
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defence to a claim set up at Law, rests either exclusively or in a great degree within the knowledge of the party advancing the claim, by which means that defence can only be obtained with the assistance of a Court of Equity: as it is, therefore, the conscience that the party should proceed in the assertion of his claims without communicating the information he possesses to the Court, has become one of the modes of equitable interposition to restrain proceedings at Law, by injunction, until the discovery is obtained; for if persons were permitted to go on at Law and insist on a trial until the discovery was obtained, it is obvious that the law would become an instrument of the grossest injustice (n).

Fraud, accident, mistake, and discovery, are, therefore, the principal grounds upon which injunctions may be granted to stay proceedings at Law. And it is to be observed, that the Court will not deny but admit the jurisdiction of the Courts at Law; and the ground upon which it issues is, the making use of their jurisdiction contrary to equity and good conscience (o).

Practice where  
question be-  
tween the par-  
ties is both le-  
gal and equita-  
ble.

In these cases the interference of a Court of Equity is governed by strict equitable principles; sometimes, however, the question between the parties depends partly upon a legal title and partly upon an equity, which will arise only in the event of that title being decided in one way. In this case, the practice of the Court requires that the party applying to the Court for its interference should admit the legal right of the other party, as in the case of a bill for ejectment; or, if circumstances arise which enable him to do that, then to allow the action to proceed, in order that the legal rights of the parties may be first ascertained, and that the plaintiff may then come to the Court to assert his legal rights (p).

Interference  
not confined  
to any particu-  
lar period of  
the cause.

It is also to be observed, that, in cases resting upon equitable grounds, the injunction is not confined to any one of the proceedings at Law (1); but, upon a proper case

(n) The cases on this subject are collected in Eden on Injunctions, p. 17.

and see what is said in 1. (p) Barnard v. Walls, 90.

(o) Hill v. Turner, 1 Atk. 516;

(1) A judgment may be enjoined in part, and be allowed to stand in the residue. Dunlap v. Stetson, 4 Mason, 349; Lyles v. Hatto, 1 John. 122; Bell v. Cunningham, 1 Sumner, 89.

sented to the Court, it may be granted at any stage of the action (1); thus an injunction is sometimes granted to stay trial (q); sometimes when the parties are in a condition to *enter up judgment* to restrain their so doing (r); sometimes they are issued after a judgment to *stay execution or proceedings under an execution* (2); sometimes after execution to stay the money in the hands of the sheriff, if it be a case of *feri facias*, or to stay the delivery of possession, if it be a *writ of possession* (s); but it is to be remembered that, after a judgment, an injunction will not be granted, except in those cases where there has been fraud or collusion in obtaining a verdict, or where the party has been unable to defend himself effectually at Law, without any fault or negligence of his own; or where the plaintiff has possessed himself of something by means of which he has obtained an unconscientious advantage (3); in short, the Courts are unwilling to interfere when it appears that the plaintiff has lain by until after a trial has taken place (t) (4).

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Proceedings in  
other Courts

Injunctions will also be granted, by the Court of Chancery, to stay proceedings in other Courts of Justice, as well as to stay proceedings in the Courts of Common Law; and it sometimes grants them when the Court which it enjoins has an original jurisdiction concurrently with itself. Ordinarily, when two Courts have a concurrent jurisdiction over the same thing, whichever Court was first possessed of the cause has a right to proceed with it, and it cannot be prohibited or restrained by any other (u); but there are some subjects which are only proper for the cognizance of the Court of Chancery, and upon those subjects, this Court will always interfere; therefore, wherever there is a trust, or any thing in the nature of a trust, it will stop the prosecution of a suit

In the Eccle-  
siastical  
Courts.

In Ecclesiasti-  
cal Courts.

(q) *Codd v. Wooden*, 3 Bro. C. C. 73; *Lady Arundell v. Phipps*, 10 Ves. 144; *Rowe v. Wood*, 2 Swanst. 234; *Prac. Reg.* 250. (s) *Woodeson's Lect.* 406, 407, and *Eden on Injunctions*, 44.  
(r) *Turner v. Wright*, 1 J. & W. 290. (t) *Ante*, p. 1841.  
(u) *Nicholas v. Nicholas*, *Prec. in Ch.* 547.

(1) *Albritton v. Bird*, R. M. Charl. 93.

(2) In reference to the damages allowed in some States upon a dissolution of an injunction of this character, see *Taylor v. Morton*, 5 J. J. Marsh. 67; *Wilson v. McCullough*, ib. 363; *Griffin v. Pickett*, 6 J. J. Marsh. 389; *Brown v. Commonwealth*, ib. 653; *Washington v. Parks*, 6 Leigh, 581; *Howard v. Warfield*, 4 Har. & M'Hen. 21; *Thomas v. Brashear*, 4 Monroe, 67.

(3) An injunction will be granted to prevent a party making use of a legal writ of execution for the purpose of vexation and injustice. *Colt v. Cornwell*, 2 Root, 109.

(4) See *Meredith v. Johns*, 1 Hen. & Munf. 583.

To restrain  
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other Courts.

in the Ecclesiastical Courts for the payment of a legacy, notwithstanding those courts have an original jurisdiction with regard to legacies (x): accordingly it has interfered in this way, in cases where the bequest of a legacy involves the execution of trusts express or implied, or where the trusts in the bequests are themselves to be pointed out by the Court; for the construction of trusts and the execution of trusts cannot be enforced by the Spiritual Courts, any more than they can be enforced by the Courts of Common Law (y). It has also interfered in this way, when a father is suing for a legacy bequeathed to an infant child; for the Court of Chancery can give proper directions for securing and improving the fund, which the Spiritual Courts are unable to do (z). It has also interposed where a legacy has been given to a married woman, and the husband has instituted a suit for it in the Spiritual Courts; because those Courts have no authority to require him to make a suitable provision for the wife and her family as a Court of Equity has; and, therefore, to allow such suit to proceed would enable the husband to do an injustice to her rights and to defeat the equity to a settlement (a). And so, although the Ecclesiastical Court is the proper jurisdiction to determine the validity of a will of personal estate, yet if the will comes into Chancery on an incident in the cause, and that incident or the will itself is admitted by the parties, it has been decided that the Court will hold the parties to be bound by such admission, and, if either of them should bring a new suit to contest that determination, it will grant an injunction to restrain them (b).

In the Court  
of Admiralty.

An injunction to stay proceedings in the Admiralty Court, in a suit for the condemnation of a ship, has been refused, when it appeared that the Court of Admiralty, by its own rules, had as large an authority as the Court of Chancery, to put the subject into a method of inquiry, and to act upon that inquiry by giving the same relief (c); but if the proceedings in the Admiralty Court are in that stage in which no new evidence can be received, as — if a sentence has been obtained and an important fact has since been discovered, the Court of Chancery, will restrain proceedings to en-

(x) *Anon.* 1 Atk. 491.

(y) *Stonehouse v. Stonehouse*, 1 Dick. 98; *Smith v. Kempson*, 2 Dick. 769.

(z) *Nicholas v. Nicholas*, ubi supra; *Rotheram v. Fanshaw*, 3 Atk. 629; *Harrell v. Waldron*, 1 Vern. 26.

(a) *Tanfield v. Davenport*, Toth. 114; *Meals v. Meals*, 1 Dick. 373.

(b) *Sheffield v. The Duchess of Buckinghamshire*, 1 Atk. 628; *Guscoigne v. Chandler*, 3 Swanst. 412, n.

(c) *Anon.* 3 Atk. 350.

force that sentence, considering it in the same light as if there had been a trial at Law and a verdict obtained, which may be affected in Equity by subsequent discovery (*d*). To restrain Proceedings in other Courts.

It may be mentioned here, that although this Court does not in general interfere with proceedings in the Court of Bankruptcy, which, as constituted by the 1 & 2 W. IV. c. 56, is a Court of Equity as well as of Law, and therefore capable of doing justice between the parties in matters of equity; yet, it seems, that it will interfere to restrain proceedings the effect of which may be to afford a foundation for a *fiat* in bankruptcy, in a case where such a proceeding would be contrary to equity. Upon this principle the Master of the Rolls, in a recent case, issued an injunction to restrain a party from taking proceedings under the Insolvent Debtors' Act, (1 & 2 Vict. c. 110, s. 8,) by means of which an act of bankruptcy might have been deemed to have been committed by the plaintiff, or *fiat* awarded against him (*e*) (1). In the Court of Bankruptcy.

With regard to foreign Courts, there has been much doubt and difference of opinion: soon after the Restoration, when the Court of Chancery was in its infancy, Lord Clarendon refused an injunction to restrain proceedings at Leghorn, after advising with the other Judges; but the reporter adds "*sed quære*, for all the bar was of another opinion" (*f*). This case has not been recognized or followed in later times, and several authorities may be found in the book where decrees and orders have been made to restrain defendants from carrying on proceedings under such actions, in Ireland (*g*), Scotland (*h*), Demerara (*i*), and other countries. In granting such an injunction, however, the Court does not presume to direct or control the Courts; but, without respect to the subject-matter of dispute, it considers the equities between the parties, and decrees *in personam* according to those equities (2). The In foreign Courts.

(*d*) *Jarvis v. Chandler*, T. & R. 2 Swanst. 313; see *Wharton v. May*, 5 Ves. 71; *Bushby v. Munday*, 5

(*e*) *Attwood v. Banks*, 2 Beav. 192. Mad. 297; *Marquess of Breadalbane*

(*f*) *Love v. Baker*, 1 Ch. Ca. 67; *v. Marquess of Chandos*, 2 M. & C.

reported as *Lowe v. Baker*, Freem. 711.

(*g*) *Clarke v. Ormonde*, Jac. 546; (i) *Bunbury v. Bunbury*, 1 Beav.

*Booth v. Leycester*, 1 Keen, 579; 318; *Beckford v. Kemble*, 1 S. & S.

*Harrison v. Gurney*, 2 J. & W. 563. 7; and see *Price v. Dewhurst*, 4 M.

(*h*) *Kennedy v. Earl of Castillis*, & C. 76.

(1) An injunction will be granted to stay proceedings under the insolvent law. *Beaty v. Beaty*, 2 John. Ch. 430.

(2) *Story Eq. Jur.* § 899; *Wharton v. May*, 5 Sumner's Vesey, 71, n. (*e*); *Eden Injunct.* (2nd Am. ed.) 176, 177.

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jurisdiction is not grounded upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the party, upon whom the order is made, being within the power of the Court; for if the Court, as in *Penn v. Lord Baltimore* (*k*), can decree the performance of an agreement touching the boundary of a province in North America, or, as in *Toller v. Carteret* (*l*), can foreclose a mortgage in the Isle of Sark, or one of the Channel Islands, in like manner it can restrain the party, being within the limits of its jurisdiction, from doing any thing abroad, whether the act forbidden be a conveyance or other act *in pais*, or the instituting or prosecuting of an action in a foreign Court (*m*). And if a defendant, who is thus ordered to discontinue a proceeding which he has commenced against the plaintiff in a foreign Court, should think fit to disobey the order, and continue the prosecution of such proceedings, the Court of Chancery, although it does not pretend to control or intermeddle with the independent jurisdiction which the other Court undoubtedly possesses, will act upon the person of the defendant by punishing him for his contempt; and if he should continue contumacious, and ultimately obtain a judgment in the other Court, it will protect the plaintiff against the consequences of that judgment (*n*).

(*k*) 1 Ves. 444.

(*l*) 2 Vern. 494.

(*m*) *Ld. Portarlington v. Soulby*, 3 M. & K. 104.

(*n*) *Bushby v. Munday*, 5 Mad. 297.

The jurisdiction of the Court may be upheld, whenever the parties, or the subject, or such a portion of the subject, are within the jurisdiction, that an effectual decree can be made and enforced, so as to do justice. *Ward v. Arredondo*, 1 Hopk. 213. See *Mead v. Merritt*, 2 Paige, 404; *Mitchell v. Bunch*, 2 Paige, 606; *Lord Cranstoun v. Johnston*, 3 Sumner's Vesey, 170, note (*a*).

It is now held, that whenever the parties are resident within a country, the Courts of that country have full authority to act upon them personally with respect to the subject of suits in a foreign country, as the ends of justice may require; and with that view, to order them to take, or to omit to take, any steps and proceedings in any other Court of justice, whether in the same country, or in any foreign country. There is an exception to this doctrine, which has been long recognized in America; and that is, that the State Courts cannot enjoin proceedings in the Courts of the United States; nor the latter in the former Courts. This exception proceeds upon peculiar grounds of municipal and constitutional law, the respective courts being fully competent to administer entire relief in the suits pending therein. *Diggs v. Wolcott*, 4 Cranch, 179; *McKim v. Voorhes*, 7 Cranch, 279.

But the like doctrine has been recently applied by the State Courts to suits and judgments in other American State Courts, where the latter are competent to administer the proper relief. *Mead v. Merritt*, 2 Paige, 402; *Bicknell v. Field*, 8 Paige, 440, 444. See *Mitchell v. Bunch*, 2 Paige, 606; 2 Story Eq. Jur. § 900; *Wilson v. Robertson*, 1 Tenn. 266.

In this view of the case, as the doctrine is now established, the only question is, whether the ends of justice require that the Court of Chancery should interfere. This must depend upon special circumstances, such as whether the Court of Chancery has better means of determining both the law and the facts of the case, as it had in *Bushby v. Mundy* (o); or when two suits are instituted for the same matter, in all respects, and there has been a decree and adjudication in this country, as there were in *Bunbury v. Bunbury* (p); or where there are questions in the cause, as in *Booth v. Leycester* (q), which must be decided according to the principles of equity before it can appear whether the parties have a clear equitable as well as legal title to the rights which they claim abroad.

To restrain  
Proceedings in  
other Courts.  
~~~~~  
Jurisdiction.

The next head proposed for consideration, in which an injunction will be granted, is, when it becomes necessary to prevent waste or any thing in the nature of waste (1). The inadequacy of the remedy at Common Law, as well to prevent as to give redress for waste, is so unquestionable, that a resort to the Courts of Law, for either of those purposes, has in a great measure fallen into disuse (2). The remedy by a bill in Equity is much more easy, expeditious and complete; for relief will be given in Equity, where the remedies provided in the Courts of Common Law could not be made to apply; as where the titles of the parties are of a purely equitable nature, or where the parties have both legal titles and legal remedies, but irreparable mischief would be done, unless they were entitled to more immediate relief than that which they could obtain at Law, or where the parties committing the waste,

To restrain  
waste, &c.

(o) *Ubi supra*.  
(p) 1 *Beav.* 318.

(q) 1 *Keen*, 579.

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(1) See *Downing v. Palmateer*, 1 *Monroe*, 65; *Shubrick v. Guerard*, 2 *Desaus.* 616.

An injunction to restrain the executors from committing waste or selling the estate of the testator was granted. *Wightman v. Brown*, 1 *Desaus.* 166.

Where the land of an insolvent debtor has been attached in a suit at law, he may be enjoined against waste during the pendency of such suit. *Camp v. Bates*, 11 *Conn.* 51.

(2) An injunction to stay waste was refused where there appeared to be no impediment to the action of waste at law. *Cutting v. Carter*, 4 *Hen. & Munf.* 424. But see *Scott v. Wharton*, 2 *Hen. & Munf.* 25, where it was held, that no person is entitled to an injunction to stay waste, unless he can maintain an action at law for it. Both these positions are incorrect. See *Kane v. Vanderburgh*, 1 *John. Ch.* 11; *Harris v. Thomas*, 1 *Hen. & Munf.* 18.



Although  
there is a  
Common Law  
remedy.

remainder-man, for an estate for life is always impeached  
waste, unless the contrary is pointed out by express limit.  
To redress this wrong, the only Common Law remedies  
either an action of waste, or an action on the case in the  
waste: the first of these remedies is given by the statutes

(r) *Cole v. Peyson*, Ch. Rep. 57.

(1) An injunction to stay waste or trespass may be granted in  
in any case, in which it would be granted according to the Engli  
ities. *Duvall v. Waters*, 1 Bland, 576. An injunction may be  
that State to stay waste pending an action at law, or a suit in Eq  
the right. *Ib.*; *Atty.-General v. Norwood*, 1 Bland, 581; *Coale v.*  
1 Bland, 581; *Flannagan v. Kips*, 1 Bland, 582; *Gittings v. Dew*  
583. See *Ingraham v. Dunnell*, 5 Metcalf, 118; *Dana v. Valenti*  
calf, 8; *Smith v. Collyer*, 8 Sumner's Vesey, 89, note (a); *Storm*  
*John. Ch.* 21.

But an injunction will not be issued to stay waste or nuisance  
hearing on the merits, except in cases of urgent necessity, or whe  
ject-matter of the complaint is free from controversy, or irreparab  
will be produced by its continuance. *Charles River Bridge*  
*Bridge*, 6 Pick. 376.

In all cases, where the right is doubtful, the Court will direct  
in the mean time, if there be danger of irreparable mischief, or  
any other good cause of granting a temporary injunction, it will b  
so as to restrain all injurious proceedings; and when the plaintiff  
fully established, a perpetual injunction will be decreed. *Ingraha*  
*nell*, 5 Metcalf, 126; 2 Story Eq. Jur. § 925, § 926.

If the thing, sought to be prohibited, is in itself a nuisance, the  
interfere to stay irreparable mischief, without waiting for the resul  
But where the thing sought to be restrained is not unavoidably a  
noxious, but only something, which may according to circumstan  
so, then the Court will refuse to interfere, until the matter has be  
law. Per Brougham, Lord Chancellor, *Ripon v. Hobart*, 1 Coop  
333; 8 C. 3 My. & Keen, 169; *The Universities of Oxf. & Cam*  
*ardson*, 6 Sumner's Vesey, 689, note (a). See *Hart v. Mayor &*  
*ny*, 3 Paige, 213.

An injunction to stay waste pending a suit to try the right wil

lge and Gloucester (s), which, taken together, enabled the  
ner of the inheritance to recover the place wasted, together with  
ble damages, as an equivalent for the damage done to him.  
person, however, could bring this action but he who had the  
mediate estate of inheritance expectant on the determination of  
estate for life (t); consequently, the remedy provided by these  
utes was inapplicable to a vast variety of cases, and it therefore  
e way to the second of these remedies, *i. e.*, to the action on  
case, which might be brought by the person in reversion, or  
remainder for life or years, as well as by a reversioner, &c. in  
(u); but as it has been determined that an action on the case  
l not lie for *permissive waste* (x), and as it is certain that it can-  
prevent the commission of *future waste*, an injunction in Equi-  
with its consequential account, is, in ordinary circumstances,  
most usual and most efficacious mode of obtaining complete  
ress. It is true that the Common Law had one remedy of a  
ventive nature, in the *writ of estrepment*, but that remedy  
ld only be obtained during the pendency of a real action; and  
when the proceeding by ejectment became the usual mode of  
ing a title to land, in which case the writ of *estrepment* did not  
ly, Courts of Equity, proceeding on the same principles, sup-  
ed the defect and extended it to other cases where the waste was  
y threatened (y).

It is obvious, from the foregoing summary of the Common Law  
remedies, that, even if the Common Law remedy were more effica-  
us than it is, there are many persons who would be without res-  
ss if the Court of Equity did not interfere, — such as children  
born, and persons having contingent or executory interests (1).  
unctions will accordingly be granted to protect the interests of  
child *in ventre sa mere* (z); of a contingent remainder-man (a),  
of an executory devisee (b); for if this protection were not

To restrain  
Waste.

Nature of  
Common Law  
remedies.

On whose be-  
half granted.

On what appli-  
cation granted.

- a) 52 H. III. c. 23; and 6 E. I. c. ferson v. Dishop of Durham, 1 Bos. & Pull. 120.  
t) 1 Inst. 53 b. and 218 b. n. 2; (z) Robinson v. Litton, 3 Atk. 211; Luttrell's case, cited Prec. in Ch. 50.  
get's case, Rep. p. 5, 76 b.  
u) Williams's Saunders, 252, n. 7. (a) Williams v. Duke of Bolton, 3 P. Wms. 268, n.  
z) Herne v. Bembow, 4 Taunt. (b) Hayward v. Stillingfleet, 1 Atk. 425; Robinson v. Litton, 3 Atk. 209; and see Stansfield v. Habbergham, 10 Ves. 272.  
y) Ld. Red. 136; Gibson v. Smith, Atk. 183; for the best accounts of Common Law remedies, see Jef-

[1] Brashear v. Macey, 3 J. J. Marsh. 93.

To restrain  
Waste.

given, it would be very easy to destroy the intention, as to in almost every settlement, whether by deed or will. There are also other cases where a person is punishable at Common Law for committing waste, and yet a Court of Equity will enjoin him; thus, it is clear, that where there is a tenant for life, with remainder to another for life, with remainder over in tail or in fee, if the first tenant for life commits waste, the remainder-man or in fee can have no action of waste,—the reason of which is that the plaintiff in the action must recover the place wasted, which would be an injustice to the remainder-man for life, whose estate is not forfeited, and if it should be recovered by the first tenant, the inheritance, (being under the limitation of the property) would never go back again. But though the law allows an action of waste, in such a case, yet the Court of Chancery will grant an injunction (c), and this *ab antiquo*, according to the case of *Moore*, 554, where Lord Ellesmere said he had seen a writ of injunction for it so long ago as in the reign of Richard the Second (d) not only will the Court of Chancery grant the injunction upon the application of the remainder-man in fee, but it will also grant it upon the application of the *mesne* remainder-man for life, though he has no right to the timber, yet if the first tenant should die, he would have an interest in the mast and all the timber. It is upon the like principle, also, that Lord Hardwicke granted an injunction at the suit of a ground landlord, to stay waste under lessee (f); and an injunction has also been obtained against a tenant from year to year, after a notice to quit, to restrain him from taking away the crops or sowing the land with a prohibited seed, in a manner which was contrary to the usual course of husbandry (g).

Where titles of  
parties are  
equitable.

A Court of Equity will also restrain waste where the parties are of a purely equitable nature: thus, in the case of mortgages, if the mortgagor in possession should attempt to cut down timber, and the land without the timber is an insuffi-

(c) *Boswell's case*, 1 Rolls. Ab. 3 P. Wm. 268, n.; *Perrot*, 1377; *Tracey v. Tracey*, 1 Vern. 23; 3 Atk. 94; *Davis v. Leo*, 6 Abraham v. Bubb, Freem. 53.

(d) *Garth v. Cotton*, 1 Dick. 205, Amb. 105, S. C. sub nom. 1 Lee.

(e) *Dayrell v. Champnets*, 1 Eq. (g) *Onslow v. —*, 16 V. Ca. Ab. 400; *Mollineux v. Powell*, Pratt v. Brett, 2 Mad. 62.

(1) *Mayo v. Foster*, 2 M'Cord Ch. 143; *Kane v. Vanderburgh*, Ch. 11.

security, a Court of Equity will restrain him (1); for, as sole estate is a security for the money advanced, the mortgagor under such circumstances, ought not to be suffered to less-  
 diminish it (h): and so it is the duty of trustees who are appointed to preserve contingent remainders, to protect the entire income for the benefit of all *the cestui que trusts* in remainder, whether vested or contingent; and as, in many instances, the value of the inheritance consists as much of the mines and timber as it does of the land, they may, by force of their trust, have their remedy in injunction, to prevent the destruction of the one or the expense of the other (i). Under this head, we may also class cases where persons are contracting for leases and other interests in property which they are only in possession of by virtue of contract; in such cases, if the plaintiff has no legal title, he has no redress at Law, but if he has such a contract as will enable him to call upon the Court to clothe the possession with a legal title, and the answer admits such contract, the injunction is granted (k).

To restrain  
Waste.

An injunction will also be granted, in some cases, where the parties have both legal titles and legal remedies, but irreparable mischief would be done unless they were entitled to more immediate relief than that which they would obtain at Law; it has accordingly been granted where the injunction amounted in fact to a prohibition to stop a trespass; for, if the Court would not interfere against a trespasser, he might go on by repeated acts of damage which would be absolutely irremediable (2). The original

In the case of  
a trespasser.

*Usborne v. Usborne*, 1 Dick. (i) *Garth v. Cotton*, 1 Dick. 183;  
*Spealey v. Spencer*, 5 Mad. *Stansfield v. Habergham*, 10 Ves. 273.  
*Lumpleys v. Harrison*, 1 J. & (k) *Norway v. Rowe*, 19 Ves. 155.

*See Scott v. Wharton*, 2 Hen. & Munf. 25; *Downing v. Palmateer*, 10, 65; *Brady v. Waldron*, 2 John. Ch. 148; *Murdock's case*, 2 Bland, 20; *Robinson v. Preswick*, 3 Edw. 246.

When the land of an insolvent debtor has been attached, in a suit at law, competent to a Court of Chancery, during the pendency of such suit, to prevent him against waste. *Camp v. Bates*, 11 Conn. 51; *Powers v. Hee*, 41, 523.

*Lowers v. Heery*, R. M. Charl't. 523, 524; *New York Printing Co. v. Paige*, 97; *Livingston v. Livingston*, 6 John. Ch. 497; *Jerome v. John*, Ch. 315; 2 Story Eq. Jur. § 928, § 929; *Attaquin v. Fish*, 5, 148; *Eden Injunct.* (2nd Am. ed.) 229, 230 to 234; *Robinson v. Iron*, 1 Bro. C. C. (Perkins's ed.) 588, 589, notes (a) and (b), and text; *Putnam v. Valentine*, 5 Ohio, 187. The practice of issuing injunctions in cases of trespass, on the principle of irreparable mischief, has become extremely common. *Hanson v. Gardiner*, 7 Sumner's Vesey, note (c), and cases cited.

To restrain  
Waste.

Equitable  
waste.

distinction was, that if a person still living committed a trespass, by cutting timber or taking lead ore or digging for coal, the Court would not interfere, except so far as to give a discovery, and then an action might be brought for the value discovered; but if the person died, then, since the trespass died with him, the Court has said it would decree an account, though the law provided no remedy. Throughout Lord Hardwicke's time and down to that of Lord Thurlow, the distinction between waste and trespass was thus acknowledged (*l*); Lord Thurlow himself acted upon the same principle, saying, that the person to be enjoined was a mere stranger, and he ought to be turned out of possession immediately (*m*). Then came Flamang's case (*n*): there a landlord of two adjoining closes let one of them to a tenant who took coal out of one close, and also out of the other which was not demised to him; and it was held, at first, that the taking the coal out of the former as waste, would be restrained, but as to the close which was not demised to him, it was a mere trespass, and the Court could not interfere; but Lord Thurlow afterwards changed his opinion, on the ground that irreparable mischief would follow his refusal, holding in effect that if the defendant was taking the substance of the inheritance, the liberty of bringing an action was not the only remedy to which in Equity he was entitled. The same principle has been acted on, and applied without scruple, in various other decisions, for unless there was a jurisdiction to prevent destruction or irreparable mischief, there would be a great failure of justice in this country (*o*) (1).

The Court will likewise interfere by injunction, where the parties committing the waste, with nothing but temporary and limited interests in the subject-matter, are maliciously and wantonly abusing their legal rights to the injury of those in remainder; this is

(*l*) Thomas v. Oakley, 18 Ves. 186. (*o*) Mitchell v. Dors, 6 Ves. 147,  
(*m*) Mortimer v. Cottrell, 2 Cox, [Sumner's ed. note (*a*) and (1), and  
205. cases cited]; Crockford v. Alexander,  
(*n*) Cited or referred to 6 Ves. 147; 15 Ves. 138; Thomas v. Oakley, 18  
7 Ves. 308; 15 Ves. 138; 18 Ves. 186. Ves. 186.

But an injunction will not be granted to restrain a mere trespass, where the injury is not irreparable and destructive to the plaintiff's estate, but is susceptible of perfect pecuniary compensation, and for which the party may obtain adequate satisfaction, in the ordinary course of law. Jerome v. Ross, 7 John. Ch. 315; Stevens v. Beekman, 1 John. Ch. 318; Amelung v. Seekamp, 9 Gill & John. 463; Smith v. Pettingill, 15 Vermont, 82; Hart v. Mayor &c. of Albany, 3 Paige, 213; Ross v. Page, 6 Ohio, 166.

(1) See Smith v. Pettingill, 15 Vermont, 82.

commonly called *equitable waste*, which may be defined to be — *the commission of such acts as at Law would not be esteemed, under the circumstances of the case, to be waste, but which are so esteemed in the view of a Court of Equity, from their manifest injury to the inheritance, though not inconsistent with the legal rights of the party committing them.* Thus, for example, it was held, in *Lewis v. Rowle's case* (*p*), that if there be a tenant for life without impeachment of waste, he had as great a power to do waste, and to convert it at his own pleasure, as a tenant in fee or a tenant in tail, so that if any trees were severed from the inheritance, either by the act of the party or by the act of law, and became chattels, the whole property in them was in the tenant for life, by force of the said clause. The necessary consequence of this doctrine was, that a tenant for life without impeachment of waste, could not in any case be restrained, in Equity, from cutting timber upon the estate, for that would have been to determine that he should not enjoy the property which the law gave him (*q*). It was, however, soon found, that this extensive power might be wantonly and capriciously abused to the prejudice of the inheritance; and, accordingly, where a tenant for life, unimpeachable of waste, was making an unconscientious use of that power, the Courts of Equity assumed the jurisdiction of restraining and modelling it (*1*). Thus it has interfered by injunction where the tenant for life was pulling down a castle (*r*), or the family mansion, or farm houses (*s*). It will not interfere where he is cutting down timber of two young growth (*t*), or where he is cutting down trees which were planted, or growing, or designedly left, for ornament or shelter (*u*). This principle has even been extended to plantations, vistas, avenues, and rides (*x*), and to trees which are either planted to shut out an object (*y*), or merely for the benefit of a view (*z*). In some of these cases, the kind of waste had been called, by the Judges, *extravagant, humorsome waste*: in others, as *voluntary, malicious,*

To restrain  
Waste.

- (*p*) 11 Rep. 80.  
 (*q*) *Aston v. Aston*, 1 Ves. 265, 36.  
 (*r*) *Vane v. Ld. Barnard*, 2 Vern. 38; Prec. in Ch. 454, S. C. sub nom. *Ld. Barnard's case*.  
 (*s*) *Aston v. Aston*, 1 Ves. 265.  
 (*t*) *Obrien v. Obrien*, Amb. 107; *Chamberlyne v. Dummer*, 1 Bro. C. C. 166, [Perkins's ed. notes]; *Strath-*  
*more v. Bowes*, 2 Bro. C. C. 88, [Perkins's ed. notes].  
 (*u*) *Packington's case*, 3 Atk. 215; *Williams v. M'Namara*, 8 Ves. 70.  
 (*x*) *Lord Tamworth v. Ld. Ferrers*, 6 Ves. 419.  
 (*y*) *Day v. Merry*, 16 Ves. 375.  
 (*z*) *The Marq. of Downshire v. Lady Sandys*, 6 Ves. 107.

(1) See *Kane v. Vanderburgh*, 1 John. Ch. 11.

To restrain  
Waste.

Against tenants in tail after possibility, &c.

Account incidental to injunction.

No bill will lie for account of waste without praying an injunction.

*intended waste*; in others again as *wanton and wilful waste*; in all of them, in short, it was the improper and abusive exercise of a legal power to the detriment of those in remainder (1).

Tenants in tail, after the possibility of issue extinct, have the same powers and are subject to the same restrictions as tenants for life without impeachment of waste; and it makes no difference that they are unimpeachable of waste, not by the provision of the grantor, but as a legal incident to their estate; for, as it was said in *Abraham v. Bubb*, "though, in some cases, *fortior est dispositio legis quam hominis*, yet that shall not be to encumber estates" (a).

It is to be remarked, that the object of the Court's interference in granting an injunction to stay this kind of waste is not by way of satisfying a damage, but in order to prevent a wrong, and, therefore, a person cannot come into Equity merely for an account, unless where the waste is of that nature that the plaintiff has no remedy at Law: the account depends entirely upon the injunction; it is incidental to and consequential upon it; and, if a person is entitled to the one, he is entitled to the other also, on the principle of preventing a multiplicity of suits; for, otherwise, he would be obliged to bring his action at Law as well as his bill in Equity, — his action by way of satisfaction, his bill by way of prevention (b) (2). But, after the determination of the tenant's estate, the bill will not lie for an account merely, where no injunction is prayed or necessary, and no injury is to be prevented; for, if there be nothing to be restrained in future, there is no reason why the Court should interfere, since the party injured has his remedy at Law for that which is already passed (c). However, the very reason given, viz., that the party injured has his remedy at Law, is a proof that the rule ought not to apply where the waste and the remedy are strictly equitable; accordingly an account was granted in *Garth v. Cotton* (d), although an injunction was not sought.

(a) *Freem*. 53; *Atty.-Gen. v. Duke of Marlborough*, 3 *Mad.* 539; *Williams v. Williams*, 15 *Ves.* 419.

(b) *Jesus Coll. v. Bloom*, 3 *Atk.* 263; *Amb.* 54, *S. C.*

(c) *Smith v. Cooke*, 3 *Atk.* 381; *Pulteney v. Warren*, 6 *Ves.* 89; *Grierson v. Eyre*, 9 *Ves.* 346.

(d) 1 *Dick.* 183.

(1) A devisee for life was restrained from cutting down the woodland of the estate and from planting the new grounds. *Smith v. Poyas*, 2 *Deaus.* 65. So from using the timber for any other purpose than for fuel, fencing, &c. *Ib.*

(2) *Duvall v. Waters*, 1 *Bland*, 576.

The same distinction is observed if the party who committed a waste dies, between those cases where the waste was legal and those cases where the waste was equitable. There is no instance of a decree against assets for an account of legal waste; since, far as the act of the offender was beneficial, his assets would be answerable at Law, and his executor would be charged (e); and, at Law, if legal waste be committed and the party dies, an action for money had and received will lie against his representatives; so, upon the same principle, or rather by analogy thereto, if equitable waste be committed, and the party dies, he must, through his representatives, refund in respect of the wrong he had done, and not retain the produce of his injury, which is recoverable in no other Court (f). It would, says Lord Cowper, be a reproach to equity to say, when a man has taken my ore or timber, and disposed of it in his lifetime, and dies, that in this case, I must be without remedy.

To restrain Waste.

Where party committing the waste is dead.

In the case of equitable waste.

The Court will interfere, by injunction, to suppress the commission or continuance of a nuisance. Nuisances are of two kinds, — those which are injurious to the public at large, and those which are injurious to the rights and interests of private persons.

To restrain nuisances.

With regard to public nuisances, the jurisdiction seems to be of very ancient date, and to be founded on the irreparable damage to individuals or the great public injury which is likely to ensue. The jurisdiction is applicable not only to nuisances strictly so called, but also to *purprestures*. By *purpresture* is meant, in its present acceptation, an incroachment upon the Crown, either upon part of the demesne lands, or upon the high roads, rivers, forts, or streets; and the difference between *purprestures* and nuisances consists in this, that where the *jus privatum* of the Crown is invaded it is a *purpresture*, but where the *jus publicum* is violated it is a nuisance (g).

Public nuisances,

— and *purprestures*.

In cases of *purpresture* the remedy is either by information for intrusion at the common Law, or by information in Equity at the suit of the Attorney-General. The consequence of a judgment at Common Law being the abatement of the erection or nuisance complained of, whether it is or is not a nuisance; whilst on an information in Equity, where the trespass does not produce any public injury, the Court may direct an inquiry whether

(e) *Hamblly v. Trott*, Cowp. 376. of *Winchester v. Knight*, 1 P. Wms. 406.  
(f) *Marq. of Lansdown v. March*.  
*Marq. of Lansdown*, 1 Mad. 116; Bp. (g) 2nd Inst. 38, 272; Harg. Law Tracts, 84, 87.



To restrain  
Nuisances.

it is most beneficial to the Crown to abate the *purpresture*, or to suffer the erection to remain and be assessed as a part of the legal revenue (*h*).

By informa-  
tion in Equity.

In cases of public nuisance, properly so called, an indictment lies to abate them, and to prosecute the offender; but an information will also lie in Equity to stop the mischief and to restrain the continuance of it (*i*). Thus Lord Cottenham held, that there was a clear jurisdiction in a Court of Equity, to restrain the magistrates of a county from doing that which would have been a nuisance to a public road (*k*).

Suits should be  
by attorney-  
general;

As a general rule, a suit of this kind should be instituted by the Attorney-General, or, at all events, he should be a party to it, unless the individual injury is distinct from that which is done to the public at large. In that case, but in that case only, the persons injured have a special right, in respect of which they are entitled to apply (*m*). Wherefore, in informations and proceedings in cases of public nuisance, the ordinary course is for the Attorney-General to take on himself to sue as representing the public; but it is equally certain that individuals who conceive themselves aggrieved may come forward and ask the assistance of the Court to prevent a public nuisance from which they have individually sustained damage (*n*) (1).

but private  
persons may  
sue.

To restrain  
private nuis-  
ances.

With regard to private nuisances, the Court will interfere by way of injunction where the mischief is irreparable (2). The general ground of its interference, is that sort of material injury to property or health requiring the application to prevent, as well as remedy, an evil, for which damages more or less would be given in an action at Law (*o*). It is not every case that would furnish

In what cases  
Equity inter-  
feres.

(*h*) Atty.-Gen. v. Richards, 2 Anst. 603; Atty.-Gen. v. Johnson, 2 J. Wil. 87; Rex v. Earl Grosvenor, Starkie's N. P.

(*i*) Mayor of London v. Bolt, 5 Ves. 129; Attorney-Gen. v. Nichol, 16 Ves. 338.

(*k*) Attorney-General v. Forbes, 2 M. & C. 124.

(*m*) Baines v. Baker, Amb. 158; Atty.-Gen. v. Cleaver, 18 Ves. 211; Spencer v. The L. & B. Railway Company, 8 Sim. 193; Sampson v. Smith, ib. 272.

(*n*) Attorney-Gen. v. Forbes, 2 M. & C. 123.

(*o*) Attorney-Gen. v. Nichol, 16 Ves. 343.

(1) See Rowe v. Granite Bridge, 21 Pick. 344; Corning v. Lowerre, 6 John. Ch. 439.

But a bill for an injunction against a public nuisance will not be sustained, unless it shows a particular injury to the plaintiff, distinct from that which he suffers in common with the rest of the public. Bigelow v. The Hartford Bridge Co. 14 Conn. 565.

(1) Dana v. Valentine, 5 Metcalf, 8. See Boston Water Power Co. v. Boston & Worcester R. R. Corp. 16 Pick. 512, 525; Bigelow v. The Hartford Bridge Co. 14 Conn. 565.

at of action against a party which would justify the interpo-  
of the Court of Equity to redress the mischief or remove  
nuoyance (1). But there must be such an injury as from its  
is not susceptible of being adequately compensated for by  
res, or such as, from its long continuance, occasions a con-  
r recurring grievance which cannot be otherwise prevented  
an injunction (p) (2). Thus it has been said, that every  
on trespass or a mere diminution of the value of the prem-  
s not a ground for an injunction; but, if the trespass con-  
so long as to become a nuisance, or if the diminution of the  
of the premises amount to irreparable mischief, then the  
t will undoubtedly interfere (q). The ordinary instances in  
the Court exercises this jurisdiction occur where it is called  
to restrain a party from building so near the plaintiff's house  
darken his ancient lights (r) (3). Injunctions have also been  
ed to stop the diversion of water-courses, and to prevent the  
g down of banks of rivers, whereby the plaintiff is exposed  
ndations from which the banks had protected him (s) (4).  
d Cottenham had upon several occasions to investigate the  
e of the jurisdiction of a Court of Equity in cases of this  
iption, where a party sues in respect of an alleged injury to  
gal rights. In such cases, it seems that when an injunction

To restrain  
Nuisances.

To restrain ob-  
struction to  
ancient lights,  
— or the di-  
version of  
water-courses,  
— or injury  
to the banks of  
rivers.  
General prin-  
ciples upon  
which the  
Court inter-  
feres to pro-  
tect legal  
rights.

Fishmongers' Comp. v. E. 1. Back v. Stacy, 2 Russ. 121; E. 1.  
1 Dick 163; Atty.-Gen. v. Comp. v. Vincent, 2 Atk. 83.  
ubi supra. (s) Robinson v. Lord Byron, 1 Bro.  
Coulson v. White, 3 Atk. 21; C. C. 588, [Perkins's ed. notes];  
Atty.-Gen. v. Nichol, 16 Ves. Lane v. Newdigate, 10 Ves. 194,  
[Sumner's ed. notes (a) and (b), and  
Ryder v. Bentham, 1 Ves. 543; cases cited]; Chalk v. Wyatt, 3 Mer.  
688.

An owner of vacant land, which is intended for house lots, is not en-  
to an injunction to restrain the exercise of an offensive trade in the  
ty thereof, whereby its value is diminished. Such owner has a com-  
and adequate remedy at law for the injury so caused. Dana v. Valen-  
Metcalf, 8.

Ingraham v. Dunnell, 5 Metcalf, 118; 2 Story Eq. Jur. § 925; Mo-  
and Hudson Rail R. Co. v. Artcher, 6 Paige, 83.  
Atty.-General v. Nichol, 16 Sumner's Vesey, 338, note (a); 2 Story  
r. § 926, § 927; Eden Injunct. (2nd Am. ed.) 270; Wilson v. Cohen,  
Eq. 80. In Atkins v. Chilson, 7 Metcalf, 398, it was held, that a lessor  
entitled during the continuance of the lease, to an injunction to re-  
he lessee from obstructing and darkening windows in the demised  
ent, unless the injury will probably be irreparable, or cannot be com-  
ed by damages recovered in a suit at law.  
Eden Injunct. (2nd Am. ed.) 232, 233, 269; Gardner v. Newburg, 2  
Ch. 162; Van Bergen v. Van Bergen, 2 John. Ch. 272; Belknap v.  
ap, 2 John. Ch. 463; Van Bergen v. Van Bergen, 3 John. Ch. 282;  
ond v. Fuller, 1 Paige, 197; Belknap v. Trimble, 3 Paige, 577, 601;  
Gifford, 1 Hopk. 416; S. C. 6 John. Ch. 19; 2 Story Eq. Jur. §  
Robinson v. Lord Byron, 1 Bro. C. C. (Perkins's ed.) 588, 589, and

to show that he has not been guilty of any improper applying for the interposition of the Court (2), not acquiescence in the sense of conferring a right on another party, but acquiescence in the sense of depriving him of the right to the interposition of a Court of Equity. The Court has then to consider the degree of inconvenience and expense to which granting the injunction would subject the defendant in the event of his losing the right; and, on the other hand, the nature of the injury the plaintiff may sustain in the event of his complaint turning out to be well founded, and the Court refusing to interfere, the decision of the question at Law; and thus balance the question between the two parties, and the extent of inconvenience likely to be incurred on the one side and on the other, and must exercise its discretion whether the injunction should be granted or withheld (t) (3); should the Court in the exercise of this discretion determine upon granting the injunction in all cases, where the legal title is disputed, put the parties in the position of speedily obtaining a decision at Law upon the right (4); and whether the parties themselves apply for the injunction or not, it is a fundamental objection to an order for an injunction in a case of this kind, if it is made without some provision for putting the question in a course of legal investigation (u). If when the Court has thus interfered by granting an injunction, it puts the plaintiff upon the terms of bringing an action upon his legal rights against the defendant, the Court will do justice to the plaintiff of the benefit of this injunction, if he is unable

(t) *Hinton v. Earl of Granville*, 299; *Sanster v. Foster*, 1 Cr. & Ph. 283. 302.

(u) *Harman v. Jones*, Cr. & Ph.

dilatory in proceeding with the action, and the defendant has not been a party to the delay (x). To protect Legal Rights.

The next point of inquiry relates to those cases where injunctions will be granted to protect the interests of an inventor or an author in his patents or copyrights, that is, in the works of his ingenuity or the labors of his mind. Patents and copyrights.

The principle upon which injunctions are granted in these cases, is not that there is no legal remedy, but that the law does not give a *complete* remedy to those whose property is invaded; Upon what principle injunction granted for, if each infringement of the patent or copyright were to be made a distinct cause of action, the remedy would be worse than the evil; the inventor or author might be ruined by the necessity of perpetual litigation, without ever being able to have a final establishment of his rights (z) (1).

In addition to this consideration, the plaintiff could have no preventive at Law to restrain the future use of his invention or the publication of his work injuriously to his title and interest. Besides which, in most cases of this sort, the bill usually seeks an account, in one case of the books printed, and, in the other, of the profits which have arisen from the use of the invention from the persons who have pirated the same; and, where the right has been already established, or, where it is established under the direction of the Court, there this account will, in all cases, be decreed as incidental to the other relief, which may be obtained, prospectively, by a perpetual injunction (a). Bill usually prays an account.

An injunction to restrain the infringement of a patent is not obtainable as a matter of course; the equitable title flows from the legal title. So also, with regard to copyrights. On both occasions it was formerly the practice, on opening the case, to send the party to Law to establish his right (b). But, on both occasions, the practice is altered, and now, *when the right of the patentee appears on the record, and the patent has been granted for* Previous trial at Law in which cases not necessary.

(x) *Bickford v. Skewes*, 4 M. & C. 498. *Oxf. and Cambridge v. Richardson*, 6 Ves. 705, 706, [Sumner's ed. 689, note (a)]; *Baily v. Taylor*, 1 R. & M. 73.

(z) *Hogg v. Kirby*, 8 Ves. 223; *Hafner v. Plane*, 14 Ves. 132; *Lawrence v. Smith, Jac.* 472. (b) *Dodsley v. Kinnersley*, Amb. 406.

(a) *Lord Red.* 138; *Hogg v. Kirby*, 8 Ves. 223, 224; *The Universities of*

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(1) 2 Story Eq. Jur. § 930, to § 936.

In Cases of Patents and Copyrights.

When patent has been granted for some length of time.

*Secus*, where the patent is of recent date,

but in such cases, if there is any doubt, it will direct an account to be kept.

*some length of time*, and the public has permitted the exclusive and undisputed possession of it for several years—under such circumstances it will interpose by injunction, in the first instance, without putting the party, previously, to establish his right in an action at Law (c) (1).

In such cases, however, there must be satisfactory evidence of exclusive possession by the patentee; and, where this is wanting, the Court will not interfere without a trial at Law (d).

But, *where the patent is only of recent date*, or, to use Lord Eldon's phrase, "where it is but of yesterday," there the Court will not act from its own notions respecting the matter in dispute, and presume its validity or invalidity without the right having been ascertained by a previous trial; but it will send the patentee to Law, and oblige him to establish the validity of his patent in a Court of Law before it will grant him the benefit of an injunction (e) (2). But, even in this case, it will use its discretion, and, whenever it sees sufficient ground of doubt, it will add to its more general directions, a direction that the party against whom the application is made, shall keep an account pending the discontinuance of the injunction, in order that if it shall finally turn out that the plaintiff has a right to the protection he seeks, amends may be made for the injury occasioned by the resistance to his just demands (f).

It may be mentioned here, that in the case of *Collard v. Allison*, above referred to (g), the patentee obtained a verdict in support of his patent, but the defendant afterwards obtained a rule *nisi* for a new trial, which was pending when a subsequent application was made for an injunction, and the Court refused to grant the injunction till the decision of the Court of Law upon the new trial.

(c) *Bolton v. Bull*, 3 Ves, 140; [Sumner's ed. note (a)]; *Harmer v. Plane*, 14 Ves. 133; *Hill v. Thompson*, 3 Mer. 622; and see *Kay v. Marshall*, 1 M. & C. 373.

(d) *Collard v. Allison*, 4 M. & C. 487.  
(e) *Hill v. Thompson*, 3 Mer. 622.  
(f) *Ibid.* 628, 629.  
(g) *Ubi supra*.

(1) *The Universities of Oxf. and Camb. v. Richardson*, 6 Sumner's Ves. 689, note (a); 2 Story Eq. Jur. § 934, § 935; *Eden Injunct.* (2nd Am. ed.) 304 to 307; *Ogle v. Ege*, 4 Wash. C. C. 534; *Isaacs v. Cooper*, *ib.* 259; *Rogers v. Abbott*, *ib.* 514; *Livingston v. Van Ingen*, 9 John. 570; *Phillips v. Sullivan*, 451, 469; *Sullivan v. Redfield*, 1 Paine C. C. 441.  
(2) 2 Story Eq. Jur. § 934.

ar principles apply to cases of copyright (*h*). At first the f Chancery would not give assistance, unless the com- had a clear legal right; Lord Northington refused to in- between two contending patents (*i*); Lord Hardwicke In the case of patents and Copyrights. the same manner, where the question was doubtful, and y applying had never had possession (*k*); and several of General rule that title must be clear at Law, ges in the great case of *Miller v. Taylor* (*l*), laid it down ar universal rule, that the Court could not grant or sustain action unless the title was made clear at Law; but Lord as denied the universality which was said to belong to the le rule, qualifying it to the extent *that an undoubted pos- qualified where there has been un- doubted pos- session under color of title.* *injunction until it is reversed at Law* (*m*). In short, it s to this, that the Court will lend its aid when the legal either directly established by decision, or where it is ap- established by uninterrupted usage and possession (*1*). re many circumstances, however, which may induce the o refrain from interfering before the right is ascertained In what cases injunction re- fused till trial at law. ermined, for the equitable title flows from the legal title; erefore, where the one is doubtful the other will not neces- follow. An injunction has, accordingly, been refused where Where the right depends upon an agree- ment. sion has depended upon the effect of an agreement, for s may alter the effect of an agreement at Law, and that

e copyright of printed books, ested in the authors or their by the 8 Anne, c. 19, amend- tended by 54 Geo. III. c. 156. right in prints and etchings ed by Stat. 8 Geo. II. c. nded by 7 Geo. III. c. 38, eo. III. c. 57. In models and busts, &c., by Stat. 38 Geo. l, amended by 54 Geo. III. c. in designs for printing linens, and muslins by 27 Geo. III. de perpetual by 34 Geo. III. d extended to other woven y 2 & 3 Vict. c. 13. Lec- ivered orally have also been l from piracy by Stat. 5 & 6 . c. 65, and by the 3 & 4 . c. 15. The authors of dra- tertainments not printed, are to have the property in such ments, and have the sole representing it or causing it

to be represented at any place of dra- matic entertainment. The copyrights of the two universities in England and the four universities in Scotland, and of the colleges of Eton, Winchester, and Westminster, are confirmed and regulated by the Stat. 15 Geo. III. c. 53; and, by the 1 & 2 Vict. c. 59, called "The International Copyright Act," her Majesty, in Council, is empowered, under certain restric- tions, to direct that the authors of books, first published in foreign coun- tries, shall have a copyright in such books.

(*i*) *Baskett v. Cunningham*, 2 Eden, 137.

(*k*) *Baskett v. The University of Cam.* cited 6 Ves. 710.

(*l*) 4 Burr. 2325, 2328, 2400.

(*m*) *The Universities of Oxford and Cambridge v. Richardson*, 6 Ves. 689; *Lord Byron v. Johnston*, 2 Mer. 29.

In cases of Patents and Copy-rights.

Where the color of title may rest with other persons.

Where the piracy forms a very inconsiderable portion of book.

Whether Equity will order illegal copies to be delivered up.

Separate bills upon each invasion of patent or copy-right.

Affidavit of title ;

must be looked to as the right in Equity (*n*). An injunction has also been refused where the color of the title, by the imprudence of the real proprietor, may equally rest with other persons, as where several individuals have been permitted to publish and sell the subject of the copyright, without any interposition on the part of the proprietor, for fourteen or fifteen years ; for a Court of Equity frequently refuses an injunction where it acknowledges a right, when the conduct of the party complaining has led to the state of things which occasions the application (*o*) : and an injunction has also been refused where the matter which was the subject of the alleged piracy formed but a very inconsiderable part of the defendant's work, so that the damage done to the plaintiff might be calculated in a few hours (*p*) ; or where the conduct of the plaintiff has been such, as in the opinion of the Court would induce the defendant to believe that the course taken by him would not be objected to (*q*).

A question of some nicety arose before Sir J. Wigram, V. C., in the case of *Colburn v. Simms* (*r*), as to whether the proprietor of the copyright of a book is entitled in Equity to an order directing the delivering up of illegal copies. His Honor came to the conclusion, that the exclusive rights of authors are now confined within the limits prescribed by the statutes ; and consequently that, if in the case before him, he had any right to the delivering up of the copies, it must be found within the provisions of the statutes, and not in the Common Law right independent of them. His Honor then examined the several statutes upon the subject, and finally came to the conclusion that, in order that an offence might be committed within the penal clauses of the Acts, the book, the copyright of which is invaded, must at the least have been composed and registered at the time of the offence.

There must be separate bills upon each distinct invasion of a patent or copyright, unless there is a privity between the parties who have infringed or pirated either the invention or the work (*s*). There must be also an affidavit of title, when the injunction is applied for before answer. In the case of a patent, it is incum-

(*n*) *Walcot v. Walker*, 7 Ves. 1, [Sumner's ed. note (*a*).] *Whittingham v. Wooler*, 2 Swanst. 428.

(*o*) *Platt v. Button*, 19 Ves. 447, [Sumner's ed. note (*a*)] ; *Coop.* 303, *S. C.* ; *Rundell v. Murray*, Jac. 311. (*q*) *Saunders v. Smith*, 3 M. & C. 711.

(*p*) *Baily v. Taylor*, 1 R. & M. 73 ;

(*r*) 2 Hare, 543.

(*s*) *Dilly v. Doig*, 2 Ves. J. 436, [Sumner's ed. note.]

the party making the application to swear as to his belief, <sup>In Cases of Patents and Copyrights.</sup> time of making it, that the invention was newly introduced country; for although, when he obtained his patent, he <sup>in what cases necessary; to what it extends</sup> very honestly, have sworn as to his belief of such being , yet circumstances may have subsequently intervened, or tion been communicated, sufficient to convince him that not his own invention, and that he was under a mistake a made his previous declaration to that effect (t). In cases <sup>In cases of copy right, assignment in writing must be shown.</sup> right where the proprietor is entitled under an assignment, und to show that the assignment was made to him in writ- it has often been determined, at Law, that a copyright be assigned in any other way (u). But if the plaintiff hap- be in the situation of assignee of an assignee, it will be suffi- r him to show that the assignment to himself was in writing, tracing the title through the *mesne* assignees from the origi- hor. Under such circumstances the Court will assume title is regular until the contrary is shown (x). The title, r, must be a legal and not an equitable one; it must be ing more than an agreement to assign, or a writing which es the intention of the parties; for a bill cannot be sus- unless the person who has the legal title is brought before rt (y).

wld greatly exceed the limits of our present inquiry to dis- Irreligious, e general rights of inventors and authors, or to state the immoral, and stances under which an exclusive property, in virtue of blasphemous ights, may be acquired or lost (1); but, in examining those publications not protected. ns in which injunctions will be granted, it is to be re- red that the Court will not interfere when the work is of a irreligious, immoral, libellous, or obscene description; for has no claim upon this equitable protection where he has ed and promulgated to the world what the law, from mo- the highest concern, will not admit to be capable of foun-

*Il v. Thompson*, 3 Mer. 624; *Latour v. Bland*, 2 Starkie, N. P. 382.  
*De la Rue*, 5 Russ. 328. (x) *Morris v. Kelly*, 1 J. & W.  
*ower v. Walker*, 2 M. & S. 482.  
*is v. Kelly*, 1 J. & W. 481; (y) *Colburn v. Duncombe*, 9 Sim.  
*Walker*, 4 Campb. 8, n.; 151.

a injunction can be granted to restrain a publication only in cases e publication will interfere with the plaintiff's right either of lit- other property, in the subject-matter of the publication. *Brandreth*, 8 Paige, 24.

court of Chancery has not jurisdiction to restrain the publication of upon a bill filed by the party whose character or business will be in- the publication. *Ib.*



In cases of Patents and Copy-rights.

ding a just title to, as property. If an action cannot be maintained, nothing can be done in a Court of Equity, which is only ancillary to the law; and, therefore, it will not give relief except where the law will give damages (z). And not only will the Court refuse to interfere when it plainly sees that the work is obscene or immoral, but even if there be a doubt as to its evil tendency, it is not the province of a Court of Equity, although there may be the submission in the answer, to decree either an injunction or an account of the profits of a work of such a nature (a); and it may be laid down, as an universal rule, that where there is any doubt as to the exclusive legal title of the party claiming an injunction in aid of it, the Court will not exercise the jurisdiction without giving an opportunity of trying the legal title by proceedings at Law (b).

In what cases extracts, quotations, abridgments, &c., will not be restrained.

At times there is considerable difficulty in determining whether a work is pirated or not; for instance, it is allowable to make a *bona fide* extract, or a *bona fide* quotation, or a *bona fide* abridgment, or a *bona fide* use of common materials in the composition of another book (c); for a man may fairly adopt part of another's labors in making an extract or quotation, but he must not do it unfairly, or, as Lord Ellenborough termed it, with an *animus furandi*; and so he may abridge, if the invention, learning, or judgment bestowed in making that abridgment will really constitute a new work; but he must not do either, in a colorable manner, to gain an advantage to himself by a fraudulent evasion of the statute (d) (1). So, in the case of a map or road-book, if the same skill, intelligence, and diligence are applied in the second instance as there were in the first, the public would receive nearly the same information from both works; but there is no doubt the

(z) Lawrence v. Smith, Jac. 471; Hime v. Dale, 2 Camp. 23 n.

(a) Walcot v. Walker, 7 Ves. 1, [Sumner's ed. notes]; Southey v. Sherwood, 2 Mer. 438; Burnet v. Chetwood, ib. 441.

(b) Bramwell v. Halcomb, 3 M. & C. 737.

(c) Short abridgments are allow-

ed; Bell v. Walker, 1 Bro. C. C. 451, [Perkins's ed. notes]; Gyles v. Wilcox, 2 Atk. 143.

(d) Butterworth v. Robinson, 5 Ves. 709, [Sumner's ed. notes]; Longman v. Winchester, 16 Ves. 263; Mathewson v. Stockdale, 12 Ves. 270; Whittingham v. Wooller, 2 Swanst. 423; Wilkins v. Aikin, 17 Ves. 422.

(1) It is piracy to collect together and reprint from Law Reports all the cases on a particular subject, though the collection and classification may be new, and with the addition of several previously unpublished decisions and notes. Hodges v. Welsh, 2 Irish Eq. 266. See Wheaton v. Peters, 8 Peters, 591; Cary v. Faden, 5 Sumner's Vesey, 24, note (b), 26, Mr. Hovenden's notes; Gray v. Russell, 1 Story C. C. 11.

and interfere to prevent a mere republication of a work of labor and skill of another person had supplied to the piracy, on such occasions, is frequently detected by one of the inaccuracies and errors (*e*); and it may be objected that the question, whether one author has made a piratical use of another's work, does not necessarily depend upon the fact that work which he has quoted or introduced into his work (*f*) (1).

In Cases of Patents and Copy-rights.

In cases of this nature the Court will take upon itself the inspection, and compare the work of the original author with the work alleged to be pirated (*g*); but the usual practice is to refer the subject to the Master, who reports whether the books are in what respect, and then the injunction is issued to restrain the publication of those parts which the Master reports to be pirated (*h*) (2).

In what manner piracies are ascertained.

In the present case, however, in which the Court, availing itself of the opportunity to read pending the motion, was led to conclude, that the parts affected with the character of piracy were taken away, and the work was left an imperfect work which could not to any use serve the purpose intended by the publication, the injunction to restrain the publication of any parts pirated from the work, was granted without waiting till all the parts pirated were distinctly marked (*i*).

In what cases injunctions granted without previously ascertaining the amount of piracy.

In general, if the parts pirated are so mingled with the portions of a work, that they cannot be separated, the Court will enjoin the publication of the whole, although a very small portion of the work may be unquestionably original. On this subject, Lord Eldon observed, that "He who has made an unauthorized use of that which does not belong to him, must suffer the consequences of so doing. If a man mixes what belongs to another that belongs to me, and the mixture be forbidden by law."

When part of a work is pirated, an injunction extended to the whole.

*Faden*, 5 Ves. 24, [Sumner]; and see *Longman* v. *Leadbetter*, 16 Ves. 269.

*Howell* v. *Halcomb*, 3 M.

*Whittingham* v. *Wooler*, 8.

(*h*) *Carnan* v. *Bowles*, 2 Br. C. C. 80, [Perkins's ed. notes]; — v. *Leadbetter*, 4 Ves. 681; *Jeffery* v. *Bowles*, 1 Dick. 429; *Mawman* v. *Tegg*, 2 Russ. 385.

(*i*) *Lewis* v. *Fullarton*, 2 Beav. 6.

To constitute piracy of an original work, it is not necessary that the whole or a larger portion of it should be taken, but it is only necessary that a substantial portion should be taken as sensibly to diminish the value of the original work as to appropriate the labors of the author. *Folsom* v. *Marsh*, 9 Cr. 100.

7 Eq. Jur. § 941.

In Cases of Patents and Copy-rights.

Publication of manuscript treatises, and letters, in what cases restrained.

MSS. precedents.

MSS. histories.

MSS. plays, although performed.

Letters,

the law, he must again separate them, and he must bear all the mischief and loss which the separation may occasion: if an individual chooses, in any work, to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction which restrained the publication of my literary matter prevents also the publication of his own literary matter, he has only himself to blame" (*k*).

By analogy to the principle upon which the Court proceeds in cases of copyright, it will also interfere to restrain the publication of *manuscript treatises*, or *private letters* which bear the character of literary composition (*l*); this was established with regard to manuscripts in Mr. Webb's and Mr. Forrester's cases, the former of whom had his *Precedents of Conveyancing* stolen out of his chambers, and the latter had his notes copied by a clerk to the gentleman to whom he had lent them (*l*); in both instances the printing and publishing them was restrained by injunction. The same protection was extended to Lord Clarendon's *History*, a copy of which had been given by his son to Mr. Gwynne; for it was not to be presumed, from such a gift, that he was to have the profits of multiplying it in print, although he might make every use of it except that (*m*). Upon the same principle it was held, before the statute (3 & 4 W. IV. c. 15), that a copyright would still exist in the manuscript of a play, although it has been performed at a public theatre, and that a surreptitious copy of it taken in short-hand, from the mouths of the performers, would be restrained in Equity; for the permission which the author gave to have it acted, did not amount to an abandonment of his title, or dedication of it to the public at large (*n*).

With regard to letters which bear the character of literary compositions, they must be treated as within the laws protecting rights of literary property, and a violation of those rights is affected with the same consequences as the publication of a treatise manuscript. Upon this ground Pope's, Swift's, and Lord Chatterfield's Letters have all been protected by means of an injunction.

(*k*) *Saunders v. Smith*, 3 M. & C. 711.

(*l*) *Webb v. Rose*, cited 2 Bro. P. C. 138; *Forrester v. Waller*, cited 4 Burr. 2331, and 2 Bro. P. C. 138;

and see *Southey v. Sherwood*, 2 M. & C. 434.

(*m*) *Duke of Queensberry v. Sher- beare*, 2 Eden, 329.

(*n*) *Macklin v. Richardson*, 1 J. & W. 694; *Morris v. Kelly*, 1 J. & W. 694.

(1) See *Brandreth v. Lance*, 8 Paige, 24; 2 Story Eq. Jur. § 943.

that a question has been raised and a doubt suggested, as to whether like protection would be given where the letters published fall, in strictness, within the terms of literary compositions. In Cases of Patents and Copy-rights.

It is now, however, settled that the writer of a letter has a special property in it with the person to whom it is addressed; but no more: it is a gift to the person to whom it is addressed, and in some cases for the purpose of reading, and in some cases for the purpose of publication. — even where they do not bear the character of literary compositions.

It is, however, settled that the letter remains in the sender, which, being so, it is not published without the writer's consent. And it is immaterial whether the publication is made with a view to profit or not for profit, the party is then selling; and if not for profit, the party is then giving that, a portion of which belongs to the writer: it is to be the result of the decisions on this subject (*p*). Understanding this right of property, the conduct of the party must be such as not to entitle him to the interference of the law, and so it was held in *Perceval v. Phipps*, where the plaintiff was left to his legal remedy, having held the defendant out to the public as a person giving false intelligence, upon spurious grounds, when that intelligence had come from the plaintiff himself, improved and confirmed by several letters which formed the subject of dispute (*q*) (2). Injunctions will also be granted to restrain the publishing of a magazine in a party's name who has ceased to publish it (*r*) (3).

To restrain the improper use of a party's name.

Jurisdiction exists in Equity to restrain, by injunction, the use by one man of the trade-marks, or name of another person (*s*) (4). In cases of this kind, as the jurisdiction is

Jurisdiction with respect to trade marks,

*s. Curl*, 2 Atk. 342; (*q*) *Lord and Lady Perceval v. Stanhope*, Amb. 737. *Phipps*, 2 V. & B. 19.  
*Stanhope v. Dunkin*, 1 B. (*r*) *Hogg v. Kirby*, 8 Ves. 215;  
*Perceval v. Curl*, 2 Atk. 342; *Eden on Injunct.* ch. 14, p. 313, 314.  
*Eden*, 2 Swanst. 403.

Eq. Jur. § 944, § 945.

Letters or papers of whatever kind, whether they be letters or private letters, or literary compositions, has a property and an interest therein, unless he unequivocally dedicate them to the use of some private person; and no person has any right to publish his consent, unless such publication be required to establish a claim, or to vindicate character. *Folsom v. Marsh*, 2 Story Eq. Jur. § 946, et seq.

*Folsom v. Marsh*, 2 Story C. C. 100, cited in next note above, and

*Locke*, 8 Paige, 75; 2 Story Eq. Jur. § 951.

*London Law Mag.* 148; 23 Amer. Jur. 138; *Sykes v. Sykes*, 3541; *Canham v. Jones*, 2 Ves. & Bea. 218; 2 Story Eq. Jur.

In Cases of Trade-marks.

exercised over legal rights upon similar principles to those which are applied in cases of copyrights, patents, and other rights of a similar description, if the legal right is disputed, the Court does not, except in a strong case, interfere in the first instance by injunction, but it puts the party upon establishing his right at Law before it confers the equitable remedy. And when it does interfere by injunction at first, it never does so without giving the party restrained an opportunity of disputing the plaintiff's legal title (s).

What is the nature of title in trade-marks.

With respect to what constitutes a legal title in trade-marks, it seems clear, that any article of manufacture not protected by patent, may be made and sold by any person, and that too by the name given to it by the inventor. But a man has no right to sell his own goods or manufactures, under the pretence that they are the goods or manufactures of another. He cannot, therefore, be allowed to use names, marks, letters, or other *indicia*, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person (t). Hence there arises so much of a property in a name or mark, that the Court will interfere by injunction against a person using the name or marks of another, even though there be no intentional deception (s).

To whom the right belongs.

In the case of *Motley v. Downman* (x), a question of some nicety arose as to whether the right to the use of a mark belongs to the successors of those who manufactured the article, or to the future lessees of the property whereon it was manufactured, but the point was not decided.

Protection withheld where there have been false representations.

With respect to these cases, it may, lastly, be observed, that the remedy given in Equity is discretionary, and will be withheld if there has been any improper conduct on the part of the plaintiff. On this principle the Court has refused to grant an injunction in the first instance, where the plaintiff has made false representations to the public concerning the article which he seeks to protect (y).

Injunction to restrain the disclosure of secrets.

Upon grounds of irreparable mischief, Courts of Equity will restrain a party from making a disclosure of secrets communicated to him in the course of a confidential employment (1); and it

(s) *Motley v. Downman*, 3 M. & C. 14. subject, see *Crawshay v. Thorn*, 1 Man. & Gr. 357.

(t) *Perry v. Nulfit*, 6 Beav. 72.

(z) *Ubi supra*.

(u) *Nullington v. Fox*, 3 M. & C. 338. For the cases at law upon this

(y) *Perry v. Truefit*, 6 Beav. 66; *Pidding v. How*, 8 Sim. 477.

(1) 2 Story Eq. Jur. § 954.

not, in such cases, whether the secrets be secrets of trade, or secrets of title, or other secrets of the party, important to his business (z). The Court, however, refused to grant an injunction to restrain the defendant from imparting the secret of an invention which had been the subject of a patent long since expired (a).

Next purpose for which injunctions may be applied, is to restrain the alienation of property where it would work an irreparable gross injustice (1) : under such circumstances an injunction will be granted, and so it often has been, when the alienation contemplated was strictly legal, but other circumstances, which the Courts of Law could not take notice of, would have rendered improper that such an alienation should be made : thus in the case of negotiable instruments, if a bill or note affected with fraud is transferred to a *bona fide* holder, without notice, the latter may sue to recover upon it ; for the bill or note would be a good instrument in the hands of the person to whom it was so transferred, and therefore the person against whose rights they may be made, is entitled to protection from that danger and the misapprehending it (b) ; accordingly, the parties will be restrained from action on the filing of the bill, and the application for it will be made *ex parte*, if it is supported by an affidavit verifying the truth of the fraudulent circumstances, lest the defendant should, by the termination of the suit, defeat its object by negotiating the security (c). It has recently been decided, that even a *bona fide* holder of a bill of exchange which has been negotiated by means of a forgery of the name of the payee as indorsee, will be restrained from suing the acceptor upon it, and that the Court will, on application, direct the forged instrument to be delivered up to be cancelled ; for though the holder may have paid a value for it, the indorsement under which he received it is a forgery, it is the same thing as if there was no indorsement of it, and then he cannot sue as the holder of it, for he has no title by indorsement,

To restrain  
the Alienation  
of Property.

To restrain  
the alienation  
of property,

in the case of  
negotiable in-  
struments.

*Polmondeley v. Clinton*, 19 Ch. 267 ; *Evitt v. Price*, 1 Sim. 267 ; *vatt v. Winyard*, 1 J. & W. 47. *Smith v. Haytwell*, Amb. 66 ; *Lloyd v. Gurdon*, 2 Swanst. 180 ; *Patrick v. Harrison*, 3 Bro. C. C. 47. (c) *Smith v. Aykwell*, 3 Atk. 566 ; *Hood v. Aston*, 1 Russ. 412.

To restrain  
the Alienation  
of Property.

or the transfer  
of stock, or the  
receipt of divi-  
dends, or the  
sale of specific  
chattels.

When suit is  
pending in Ec-  
clesiastical  
Court as to ad-  
ministration.  
Distinction  
where probate  
or administra-  
tion already  
granted.

and that was the only way by which he could obtain a title to it (d) (1).

Upon a like principle, the Court will interfere to restrain the transfer of stock (2), or the receipt of bank annuities, or the sale of specific chattels, as when the title of stock is controverted between principal and agent (e); or, when the dividends have been applied by a society on erroneous principles, so as to exhaust the whole fund (f); or when it is necessary to protect the enjoyment of specific chattels which cannot be the subject of compensation in damages (g.)

If a suit is actually depending in the Ecclesiastical Courts with respect to the title to stock, or with regard to the validity of a probate, or when the representation is in dispute, the Court will restrain the parties *pendente lite* from receiving or dealing with the property of the deceased (3). But a distinction must here be made, for if there is a contest who shall be the executor or administrator, and there is nothing to show who is to be considered as sustaining either of those characters, the interference of the Court is quite of course (h); if, however, a probate or letters of administration have been previously granted, and a suit has been instituted in the Ecclesiastical Courts to dispute their validity, the Court of Chancery will not interfere, *as a matter of course*, because there has been an adjudication already: wherefore under such circumstances, it looks into the whole case, and if it sees sufficient ground for its interposition, such as fraud, insolvency, or a *devastavit*, it grants an injunction, and also a receiver pending the litigation (i); but where a plaintiff has instituted proceedings in the

(d) *Esdalle v. La Nauze*, 1 Y & C. 394.

(e) *Lord Chedworth v. Edwards*, 8 Ves. 46; *sed vide Cox v. Paxton*, 2 Mad. Ch. Pr. 2d ed. 155.

(f) *Reeve v. Parkins*, 2 J. & W. 390.

(g) *Lady Arundell v. Phipps*, 10 Ves. 139.

(h) *King v. King*, 6 Ves. 172,

[Sumner's ed. note (e) and 173, note (1), and cases cited]; *Watkins v. Brent*, 1 M. & C. 102; *Atkinson v. Henshaw*, 2 V. & B. 85.

(i) *Andrews v. Powys*, 2 Bro. P. C. 504; *Knight v. Duplessis*, 1 Ves. 324; *Ball v. Oliver*, 2 V. & B. 96; *Watkins v. Brent*, 7 Sim. 512; 1 M. & C. 97, S. C.; *Marr v. Littlewood*, 2 M. & C. 454.

(1) An injunction may be granted to prevent the transfer of a specific thing, which, if transferred, would be irretrievably lost to the owner; such as negotiable securities and stocks. *Osborn v. U. States Bank*, 9 Wheaton, 738; 2 Story Eq. Jur. § 906, § 907; *Eden Injunct.* (2nd Am. ed.) 341, 342; *Darst v. Brockway*, 11 Ohio, 462.

(2) 2 Story Eq. Jur. § 907; *Osborn v. U. States Bank*, 9 Wheaton, 738; *Eden Injunct.* (2nd Am. ed.) 343, 344, 345.

(3) See 2 Story Eq. Jur. § 907; *Osborn v. U. States Bank*, 9 Wheaton, 738; *Spendlove v. Spendlove*, Cam. & Norw. 36.

ecclesiastical Court, for the mere purpose of challenging a will, but alleging any special matter, he cannot put forward that instance as of itself furnishing a sufficient reason for depriving his adversary of his legal title to administer the assets; there must be some other reason (*k*).

To restrain  
the Alienation  
of Property.

The Court, acting upon the principles above laid down, will grant an injunction to restrain a party from making vexatious alienations of real property, *pendente lite* (*l*) (1); so it will enjoin a party from conveying the legal title to real estate, pending a suit for the specific performance of a contract for the sale of that estate (*m*); for, in every such case, the plaintiff may be put to the expense of making the vendee a party to the proceedings; and, at the end of the suit, if he prevails in the suit, may be embarrassed by a new outstanding title under the transfer. Although the maxim of law says "*pendente lite nil innovatur*," that maxim is to be understood as warranting the conclusion, that the conveyance so made is absolutely null and void, at all times, and for all purposes: the true interpretation of the maxim is, that the conveyance, does not vary the rights of the parties in that suit; they are not bound to take notice of the title acquired under the conveyance with regard to them, the title is to be taken as if it had never been conveyed, as otherwise suits would be interminable, if one party during the suit could, by conveying to others, create a necessity for introducing new parties (*n*).

To restrain  
alienations of  
real property ;

In like manner sales may be restrained in all cases where they are inequitable, or may operate as a fraud upon the rights or interests of third persons; as in cases of trusts and special authorities where the party is abusing his trust or authority (*o*); and where sales have been made to satisfy certain trusts and purposes, there is danger of a misapplication of the proceeds, Courts of equity will also restrain the purchaser from paying over the purchase money (*p*). So also husbands may be restrained from

— or the  
sale of trust  
property, &c.

— or the  
property of  
wives by hus-  
bands.

*Jones v. Frost*, 3 Mad. 1; *Dewarke*, 1 S. & S. 108; and see also *1 M. & C. 103*, and *2 C. 457*.

*Daly v. Kelly*, 4 Dow. 440; see also *Turner v. Wright*, 4 Beav.

*Paine*, 11 Ves. 197; *Gaskell v. Durdin*, 2 B. & B. 169; *Bishop of Winchester v. Beavor*, 3 Ves. 314; *Moore v. M'Namara*, 2 B. & B. 186; et vide ante, p. 328.

(*o*) *Anon.* 6 Mad. 10.

*Echcliff v. Baldwin*, 16 Ves. 217; *Daly v. Kelly*, 4 Dow. 435; *Metcalf v. Pulvertoft*, 2 V. 205; *Bishop of Winchester v.*

(*p*) *Green v. Lowes*, 3 Bro. C. C. 217; *Mathews v. Jones*, 2 Anst. 506; *Hawkshaw v. Parkins*, 2 Swanst. 549.



To restrain the  
Breach of  
Covenants.

— or the  
presentation to  
a benefice.

— or the ap-  
pointment of a  
minister in a  
dissenting  
chapel.

To restrain the  
indorsement of  
the registry or  
the sailing of a  
ship,

or the removal  
of timber;

to restrain the  
breach of  
covenants.

transferring property in fraud of the equitable rights of their wives (*q*).

Acting upon the same principles, the Court will, where there is a dispute respecting the right of presentation to an ecclesiastical benefice, not only restrain the party having the legal right of presentation from presenting, but it will also enjoin the bishop from inducting and from taking advantage of a lapse pending the litigation, by collating to the benefice, till the decree of the Court (*r*).

The Court has also, upon the same ground, restrained the trustees of a dissenting chapel, from appointing as a minister of that chapel, a person not duly qualified according to the constitution of the chapel, to hold the office, although it refused that part of the motion which asked for an injunction to restrain the trustees from permitting persons not duly qualified from officiating occasionally, during the short time that might elapse before the burning, when the facts upon both sides must be known (*s*).

Injunctions have, in like manner, been granted to restrain indorsement of the certificate of a ship's registry (*t*), or the sailing of a ship, upon the application of a part owner, whose share was unascertained, in order to ascertain that share, and to obtain the usual security given in the Court of Admiralty for the due return of the ship (*u*). So they will be granted against the removal of timber wrongfully cut down (*x*).

Injunctions will also be granted to compel the due observance of personal covenants, where there is no effectual remedy at Law: thus, in the old case of the parish bell, where certain persons owning a house in the neighborhood of a church, entered into an agreement to erect a cupola and clock, in consideration that the bell should not be rung at five o'clock in the morning to their

(*q*) Anon. 9 Mod. 43; Eden on Inj. ch. 14, p. 295, 296; Roberts v. Roberts, 2 Cox, 422; Flight v. Cook, 2 Ves. 619; 1 Eq. Ca. Ab. 360, pl. 4; Cadogan v. Kennett, Cowp. 436.

(*r*) Nicholson v. Knapp, 9 Sim. 326.

(*s*) Milligan v. Mitchell, 1 M. & K. 446.

(*t*) Thompson v. Smith, 1 Mad. 395.

(*u*) Haly v. Goodson, 2 Mer. 77; Christie v. Craig, ib. 137; Abbott on Shipp. pt. 1, ch. 3, §§ 4, 5. The Court refused to restrain the sailing of a ship on the application of a part

owner, where the ship was intended to sail on the next day, and it did not appear, by the affidavit, that there was any circumstance to account for the plaintiff's delay in applying. Christie v. Craig, 2 Mer. 137. The Court also refused to stop the sailing of a ship on the ground that it contained goods which belonged to the plaintiff, but which he had sold to a party who had become insolvent, but over which he had retained a right of stoppage in transitu. Goodhart v. Lowe, 2 J. & W. 349.

(*x*) Anon. 1 Ves. J. 93.

disturbance; the agreement being violated, an injunction was afterwards granted to prevent the bell being rung at that hour (y) (1). Upon the same ground, a celebrated play writer, who had covenanted not to write any dramatic performances for another theatre, was, by the injunction, restrained from violating the covenant (z). So an author who had sold his copyright in a work, and covenanted not to publish any other to its prejudice, was restrained by injunction from so doing (a).

To restrain the Breach of Covenants.

Upon the same ground, in *Rankin v. Huskisson* (b), an injunction was granted to restrain the Commissioners of Woods and Forests from building on the site of Carlton Gardens, in violation of the terms of an agreement entered into by them with the plaintiffs for a building lease of an adjoining part of the site (2).

By erecting buildings in opposition to.

Injunctions have also been granted to restrain a party who has sold the good-will of his trade, and covenanted not to exercise the same trade within certain limits, from exercising such trade within the prescribed limits: thus where a coach-master having sold his share of the business to his partner, with an undertaking not to be concerned in any coach running from Reading to London, or prejudicial to the business which he had sold, set up a coach to run from Pangborne to London, through Reading, he was restrained from running the coach from Reading to London and *vice versa* (c).

—or by the exercise of a trade.

(y) *Martin v. Nutkin*, 2 P. Wms. 566.

(z) *Morris v. Colman*, 18 Ves. 437, Sumner's ed. note]; *Clarke v. Price*, 2 Wils. 157.

(a) *Barfield v. Nicholson*, 2 S. & 3. 1; *Colburn v. Simms*, 2 Hare, 543.

(b) 4 Sim. 13.

(c) *Williams v. Williams*, 2 Swan. 553. Although it has been long settled that covenants restraining the exercise of a trade in a particular place, are contradistinguished from

covenants in general restraint of trade, are valid, and that Courts of Equity will compel the specific performance, and enjoin against the violation of such covenants, yet it has also been held, that the mere sale of the goodwill of trade imposes no obligation on the vendor to forbear the exercise of the same trade, and that Courts of Equity will not execute a contract for the sale of a goodwill. *Ibid.* n. (a), et vide the cases there cited.

(1) Where a block of buildings has been erected, with particular covenants respecting the enjoyment thereof, each purchaser or owner will be entitled to an injunction to prevent a breach of the covenants, as by the erection of any stables, slaughter-houses, glue-factories, &c. *Barrow v. Richards*, 8 Paige, 351; *Williams v. Jersey*, 1 Craig & Phil. 91.

(2) In Massachusetts, it has been held, that a lessor is not entitled, during the continuance of the lease, to an injunction to restrain the lessee from obstructing and darkening windows in the demised tenement, unless the injury will probably be irreparable, or cannot be compensated by damages recoverable in a suit at law. *Atkins v. Chilson*, 7 Metcalf, 395. The Court in that case remark, "No doubt an injunction will lie, to restrain the lessee from violating his covenant, in a proper case, and when it is necessary to prevent irreparable mischief." Page 404.

To restrain the  
Breach of  
Covenants.

— or by proceeding to  
make a man a  
bankrupt.

— by destroying the  
banks of  
streams, &c.

By digging  
gravel, sand,  
&c.

— by converting houses  
to a different  
use.

— by cultivating land  
contrary to the  
custom of the  
country.

Upon the same principle, where bankers had sanctioned an arrangement entered into by certain persons, copartners, who were indebted to them, whereby it was arranged that, upon the retirement of one of the copartners, (the plaintiff,) the assets should be transferred to the continuing partners, who were to take upon themselves the partnership liabilities, and that the bankers should release the plaintiff, who was the retiring partner, from his liability to them, but afterwards attempted, by means of the debt, to make the retiring partner, a bankrupt, by proceeding under the 1 & 2 Vict. c. 110, s. 8 (d); they were restrained from so doing by injunction.

Injunctions have also been, frequently, granted to restrain lessees who had covenanted to keep the banks of rivers or ponds in repair, from destroying or impairing them (e); or an outgoing tenant from removing dung or crops, contrary to express covenants contained in his lease (f); or, where the violation of the covenant was not provided for, by liquidated damages, to restrain the ploughing up of meadow, &c. (g).

In one of the earliest cases upon this subject, an injunction was granted till the hearing, by the House of Lords, upon appeal, to restrain a lessee from digging sand, gravel, &c. in violation of a covenant secured by a penalty (h); and in a case shortly afterwards, before Lord Hardwicke, an injunction was granted, expressly for the purpose of restraining a breach of covenant, by a tenant, who was converting houses to a different use from that prescribed by his lease (i).

Though a lessee is required by law, to cultivate the lands demised to him in a husbandman-like manner, conformable to the custom of the country (k), yet this is usually defined by some express covenant. It has, upon this subject, been determined at Law, that a covenant to occupy in a good and husbandman-like

(d) *Attwood v. Banks*, 2 Beav. 192.

(e) *Eden on Inj.* 198; *Lord Bathurst v. Burden*, 2 Bro. C. C. 64, [Perkins's ed. notes]; *Lord Kilmorey v. Thackeray*, cited *ibid.*

(f) *Johnson v. Goldswaine*, 3 Ans. 749; *Geast v. Ld. Belfast*, *ib. n.*; *Pulteney v. Shelton*, 5 Ves. 147, [Sumner's ed. Mr. Hovenden's notes], 260, [Sumner's ed. 261, note (a)], and errata, *ib.*; *Lord Grey de Wilton v. Saxon*, 6 Ves. 106, [Sumner's ed. note (a)]. The case of *Lathropp v. Marsh*, 5 Ves. 259, is stated to be clearly wrong, as there were not only

breaches of covenant, but also distinct acts of waste committed and threatened. *Eden on Inj.* 198.

(g) *Aylet v. Dodd*, 2 Atk. 238; *Woodward v. Gyles*, 2 Vern. 119; *Rolfe v. Peterson*, 2 Bro. P. C. (ed. Tomlins,) 436.

(h) *City of London v. Pugh*, 4 Bro. P. C. (ed. Toml.) 395; *Eden*, 199.

(i) *Worden v. Ellers*, 18 Dec. 1739. There is a very full account of Lord Hardwicke's judgment, 6 Serjt. Hill's MSS. 2 & 12, *ib.* 76; *Eden*, 199.

(k) *Powley v. Walker*, 5 T. R. 373; *Eden*, 199.

manner, according to the custom of the country, will be broken by contravening the prevalent course of husbandry in the neighborhood; and that, even if the contract be simply to occupy the estate in a good and husbandman-like manner, this will throw a liability upon the tenant to cultivate the land according to the practice of the neighborhood (l); and even, though a farm be held under a written agreement, the custom of the neighborhood may well be insisted upon, provided it be not either expressly or by implication excluded by the terms of the agreement (m). The same principle has been acted upon in Equity, where an injunction has been granted to restrain a tenant from year to year, (who, it was said, was equally bound as a tenant for a longer period, to manage his farm in a husbandman-like manner,) from removing crops, manure, &c., contrary to the custom of the country (n). In a previous case a tenant was restrained from ploughing up pasture land, although the lease did not contain an express covenant not to convert pasture into arable (1); but the landlord was held entitled to the injunction, on the ground of there being a covenant to manage pasture in a husbandman-like manner (o). Upon the same principle, the Court has interfered to restrain a tenant from sowing mustard, saffron, woad and other deleterious crops, as being contrary to the course of husbandry (p).

To restrain the Breach of Covenants.

— in the case of a tenant from year to year.

By sowing deleterious crops.

A distinction has been made, as to enforcing, by injunction, the specific performance of *express covenants* and of *implied agreements*; and the Court has refused to interfere to restrain a tenant, who was holding over, from removing articles contrary to the custom of the country, as the Court would not imply special covenants, as to cultivation, from the mere act of holding over (q).

Distinction between express and implied covenants.

A covenant to repair, and, at the end of the term, to surrender buildings in good condition, does not preclude an injunction against pulling them down and carrying away the materials just before the end of the term (r).

Covenant to leave premises in repair does not preclude an injunction.

Where there is a covenant not to convert premises into a shop, or to carry on a trade without a license in writing; the permission

License to carry on one trade does not extend to all trades.

- (l) *Leph v. Hewitt*, 4 East, 154. (p) *Pratt v. Brett*, 2 Madd. 62; Eden, 200.  
 (m) *Wigglesworth v. Dallison*, Doug. 201; *Senior v. Armitage*, 1 Holt, N. P. C. 197; *Webb v. Plummer*, 2 B. & A. 746; Eden, 199. (q) *Kimpton v. Eve*, 2 V. & B. 349; Eden, 200.  
 (n) *Onslow v. —*, 16 Ves. 173. (r) *Mayor, &c. of London v. Hedger*, 18 Ves. 355; Eden on Inj. 260.  
 (o) *Drury v. Moilins*, 6 Ves. 328.

(1) See *Atkins v. Chilson*, 7 Metcalf, 404.

To relieve  
from Forfeiture  
or Penalties.

To relieve  
from forfeiture  
or penalties.

In what cases  
granted.

In what cases  
refused.

of the lessor, without writing, to carry on one trade will not amount to a general license for any trade, so as to preclude the lessor from his right to an injunction (s).

It may be observed here, that, as the Court will, by its injunction, compel the performance of a covenant or agreement, so, on the other hand, it will relieve a party against the consequences of the nonperformance of it, where such consequences involve either a forfeiture or the imposition of a penalty (1).

The doctrine upon the subject of relief from penalties, has thus been stated by Lord Thurlow: — “Where a penalty has been inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only is accessional, and to secure the damage really incurred (t).” But where the parties, instead of securing the performance of the agreement by a penalty, have fixed upon a certain sum by way of liquidated damages, to be paid in the event of the nonperformance of the agreement, a Court of Equity (except in certain cases of waste, which will be noticed hereafter) refuses to interfere in restraining the recovery of such damages (2).

Upon these principles, Courts of Equity interpose to restrain proceedings at Law for the recovery of penalties. But where a forfeiture had happened under a by-law of a corporation, which provided that members should receive notice of default in paying a call, and incur the forfeiture by nonpayment ten days after the notice sent, Sir W. Grant refused to relieve, although the lapse arose from accidental circumstances, and absence from town when the notice was sent; he mentioned a case in Ireland of a person who, after having paid some instalments on a lease, neglected to make a further payment, and forfeited the instalments he had paid (u); and though relief has sometimes been given against the forfeiture of a covenant for a renewal (z), which, in Ireland,

(s) *Macher v. Foundling Hospital*,  
1 V. & B. 183; *Eden on Inj.* 201.  
(t) *Sloman v. Walter*, 1 Bro. C. C.  
419, [Perkins's ed. notes.]

(u) *Sparks v. Liverpool Water  
Works' Company*, 13 Ves. 423.  
(z) *Rawstorne v. Bentley*, 4 Bro.  
C. C. 415, [Perkins's ed. notes.]

(1) *Eden Injunct.* (2nd Am. ed.) 41, 42, and notes. There seems to be a distinction taken, in Equity, between penalties and forfeitures. In the former, relief is always given, if compensation can be made; for it is deemed a mere security. In the latter, although compensation can be made, relief is not always given. 2 *Story Eq. Jur.* § 1320, § 1321, § 1322, § 1323, and notes.

(2) See *Eden Injunct.* (2nd Am. ed.) 41, 42; *Skinner v. Dayton*, 2 *John. Ch.* 535; *S. C.* 17 *John.* 357; *Livingston v. Tompkins*, 4 *John. Ch.* 425; *Walker v. Wheeler*, 2 *Conn. R.* 299; 2 *Story Eq. Jur.* § 1318.

formed a distinct head of local Equity (*y*), yet the inclination of the Courts is to the contrary, unless the right has been forfeited as a consequence of fraud, accident, mistake, or any similar Equity (*z*) (1).

To relieve from Forfeiture or Penalties.

A common instance of this species of relief is that which is given against a clause of re-entry for nonpayment of rent (2). This has been a ground of equitable interference from the earliest times, and there has been a parliamentary recognition of the doctrine by the St. 4 Geo. II., c. 28, ss. 2 and 3, which, limiting the time within which such relief is to be given to six months, permits the tenant to pay into Court, at any time before the trial of an ejectment, the arrears of rent and costs, and provides that all further proceedings shall thereupon cease (*a*).

In case of non-payment of rent,

This relief is granted upon the principle that compensation is made to the landlord by the payment of the rent with interest; a doctrine contradicted by general experience, and often found fault with as imperfect and unjust (*b*) (3). Lord Northington appears by analogy to it, to have been of opinion, that the Court might relieve where a tenant had committed a forfeiture by cutting down timber (*c*). It is, however, scarcely necessary to remark how extremely inadequate pecuniary compensation must generally be in such a case; and it is probable, if the question is ever maturely considered, that a contrary determination will be adopted (4).

— or of cutting down a timber.

But where it is clear that the covenant is of such a nature that the Court of Equity cannot make a compensation for the breach of, as in the case of covenants *not to assign without license* (*d*), or

Injunctions in cases of covenants not to assign or to insure.

(*y*) O'Neil v. Jones, 1 Ridg. 170; Lane v. Hamilton, ib. 180; Bateman v. Murray, ib. 187; Boyle v. Lysaght, ib. 184; Vern. & Scriv. 135, S. C.; Lagrath v. Lord Muskerry, ib. 166; Ridg. 463, S. C.; Jackson v. Saunders, 1 Sch. & Lef. 443; 2 Dow. 437; Ennon v. Napper, 2 Sch. & Lef. 32; Magrane v. Archbold, 1 Dow. 19; Earl of Mountnorris v. White, ib. 459; Barrett v. Burke, 5 ib. 1; Leating v. Sparrow, 1 B. & B. 367; Mosop v. King, 2 ib. 81; Barrett v. Carson, ib. 189.

Hilton, 1 Fonb. 432, 5th ed.; Bayley v. Corporation of Leominster, 3 Bro. C. C. 529; Baynham v. Guy's Hospital, 3 Ves. 295; Eaton v. Lyon, ib. 690; City of London v. Mitford, 14 Ves. 41.

(*a*) Eden on Injunc. 23.

(*b*) Hill v. Barclay, 16 Ves. 405; 18 Ves. 61, S. C.; Bracebridge v. Buckley, 2 Pri. 216; Reynolds v. Pitt, 19 Ves. 140.

(*c*) Northcote v. Duke, 2 Eden, 322; Amb. 511, S. C.

(*d*) Wafer v. Mocato, 9 Mod. 112.

(*z*) Eden on Injunc. 23; Allen v.

(1) Sanders v. Pope, 12 Sumner's Vesey, 282, note (*a*), and cases cited.

(2) Eden Injunct. (2nd Am. ed.) 43, 44, 45, and note.

(3) See 2 Story Eq. Jur. (3rd ed.) § 1315, in note (2).

(4) 2 Story Eq. Jur. § 1315, § 1316, and notes.

To relieve  
from Forfeit-  
ure or Penal-  
ties.

or to repair,

or to rebuild.

For the protec-  
tion of wards  
of Court.

In cases of in-  
terpleader.

To restrain  
setting up a  
legal title.

to *keep the premises insured* (e), relief will not be given against penalty. Considerable discussion, also, has taken place how the Court would relieve against a forfeiture incurred by the breach of a covenant *to repair*. In the case of *Sanders v. Pope* (f), Lord Erskine, upon the authority of a determination of Lord Maclesfield (g), expressed a strong opinion in favor of the equitable jurisdiction; but the doctrine, after full and elaborate discussion has been established to the contrary (h). The same determination would, consequently, be made with respect to the breach of a covenant *to build*, though the authorities are conflicting as to the power to decree a special performance in such case (i) (1).

Injunctions may also be issued for the protection of a ward of Court from removal, marriage, or improper influence (k); and likewise, in cases of interpleader (2): but as the principle upon which the Court proceeds, in cases of this description, does not come within the scope of this work, they will not be further alluded to.

Courts of Equity will likewise prevent a person from setting up an unconscientious advantage at Law, so as to interpose impediments to just rights of the other party (3). Thus if an ejectment is brought to try a right to land, the Court of Chancery will restrain the party in possession from setting up a term of years or other interest in a trustee, lessee, or mortgagee, which may hinder the fair trial of the right (l); but this will not be done in every

(e) *Rolfe v. Harris*, 2 Pri. 206, n.; *Reynolds v. Pitt*, ib. 212; 19 Ves. 134, S. C.; *White v. Warner*, 2 Mer. 459.

(f) 12 Ves. 282, [Sumner's ed. notes].

(g) *Hack v. Leonard*, 9 Mod. 91.

(h) *Hill v. Barclay*, 16 Ves. 402; 18 Ves. 56, S. C.; *Bracebridge v. Buckley*, 2 Pri. 200; sed vide *Hannam v. South London Water Works' Company*, 2 Mer. 67.

(i) There are two instances of special performance decreed of covenants to rebuild; *City of London v. Nash*, 3, 515; 1 Ves. 120; *Allen v. Harding*, 2 Eq. Ca. Ab. 17; and, in *Moseley v. Virgin*, 3 Ves. 184, Lord Rosslyn stated that a specific performance might be decreed. Lords

Thurlow and Kenyon, on the other hand, have pronounced a contrary opinion. *Errington v. Aynealy*, Bro. C. C. 343, [Perkins's ed. notes]; *Lucas v. Comerford*, 3 Bro. C. C. 166, [Perkins's ed. notes and cases cited; 1 Ves. J. 235, S. C.] That covenant to repair cannot be specifically performed, vide *Rayner v. Stone*, 2 Eden, 128; *Flint v. Brandon*, Ves. 159, [Sumner's ed. 164, notes *Eden on Inj.* 27.

(k) *Pearce v. Crutchfield*, 14 Ves. 206.

(l) Lord Red. 134, 135; *Bond Hopkins*, 1 Sch. & Lef. 430; *Palten v. Warren*, 6 Ves. 89; *Crow v. T. rell*, 3 Mad. 181; *Leigh v. Leigh*, Sim. 349.

(1) *Eden Injunct.* (2nd Am. ed.) 46, 47, 48, and notes.

(2) *Eden Injunct.* (2nd Am. ed.) 393, et seq.

(3) 2 *Story Eq. Jur.* § 903; *Eden Injunct.* (2nd Am. ed.) 406, et seq. —

case, for, as the Court proceeds upon the principle that the party in possession ought not, in conscience, to use an accidental advantage, if there is any circumstance which meets the reasoning upon this principle, the Court will not interfere; therefore, if the possessor is a purchaser for valuable consideration, without notice of the title of the claimant, this is a title, in conscience, equal to that of the claimant, and the Court will not restrain the possessor from using any advantage he may be able to gain to defend his possession (*m*).

Setting-up of a legal Title.

Injunction not granted against a purchaser without notice.

Where an injunction is sought to prevent the setting up of outstanding terms, it can only be obtained (except with consent) by decree at the hearing; for, until the decree, the Court must suppose the parties to be litigating upon questionable rights: the injunction cannot be applied for by a previous motion, for it might afterwards appear, when the case is heard, that there are circumstances which would entitle the defendant, as well as the plaintiff, to equitable assistance at the trial; and, therefore, to grant such relief upon motion would be to decide the whole Equity of the case before it was ripe for decision (*n*).

Can only be granted at the hearing.

Lastly, it is to be noticed, that, where repeated attempts are made to litigate the same question, which the Courts of ordinary jurisdiction will, in many cases, admit, the Court of Chancery will not lend to the oppression which may be occasioned by the use of this privilege. Thus, as a judgment in ejectment is not final or conclusive, but the same proceedings may be repeated for ever, a perpetual injunction will be granted, to prevent the repetition of them, when the assertion of such right becomes oppressive to the opposite party (*o*). It is on this ground that Courts of Equity have interfered, by bills of peace; but as the writ is not issued in such cases, unless upon decree, they do not come within the province of the present section.

To restrain repeated litigation of the same point.

It is to be observed that the Court will not, by injunction grant, upon an interlocutory application, direct the defendant to perform an act. There is indeed a passage in the MS. report of the case of *Worden v. Ellers* (*p*), from whence it may be inferred to

To direct the performance of an act.

(*m*) *Jerrard v. Saunders*, 2 Ves. J. 458, [Sumner's ed. notes; ante, 826, 827, and notes]; *Maundrell v. Maundrell*, 7 Ves. 567; 10 Ves. S. C.; *Baker v. Mellish*, ib. 549.  
 (*n*) *Hylton v. Morgan*, 6 Ves. 293; *see v. Byrne*, 2 Sch. & Lef. 537; *Key v. Lockett*, 1 S. & S. 419; *Key v. Pearce*, ib. 420.  
 (*o*) *Lord Bath v. Sherwin*, Prec. in Ch. 261; 4 Bro. P. C. 373, S. C.; *Leighton v. Leighton*, 1 P. Wms. 671; 4 Bro. P. C. 378, S. C.; *Devonshire v. Newenham*, 2 Sch. & Lef. 211.  
 (*p*) 18 Dec. 1739; 6 Serjt. Hill's MSS. 2 & 12 ib. 76; *Eden on Inj.* 199.



To restrain  
repeated Liti-  
gation.

Not ordered  
upon motion.

Injunction to  
perform an act  
not usually  
granted.

Secus where it  
may be effect-  
ed by a re-  
strictive order.

have been Lord Hardwicke's opinion that the Court might, *upon* motion, order the defendant to pull down a building which *was* clearly a nuisance to the plaintiff; and there is an early case in Tothill, of an order to show cause why a defendant who *had* ploughed up ancient pasture land should not lay it down again in grass (*q*). The contrary doctrine is, however, now firmly established. In the case of *Ryder v. Bentham* (*r*), Lord Hardwicke, upon a motion for an order to pull down certain blinds, observed, that he never knew an order to pull down any thing, *on motion*. Lord Thurlow, in a subsequent case, upon a motion to restrain a party from digging a ditch, and to compel him to put every thing in the same state in which it was before by filling up so much as he had already dug, refused the latter part of the motion (*s*). So, in another case, Lord Eldon refused an order specifically to repair the banks of a canal, stop gates, and other works (*t*).

In the case of *Hooper v. Brodrick* (*x*), an injunction was granted, *ex parte*, restraining the defendant from discontinuing to use certain premises as an inn; but was dissolved upon the ground that there is no jurisdiction to restrain a person from not keeping an inn, which is the same in effect as ordering him to keep one.

But though the Court will not, directly and in terms, compel the performance of an act upon motion, yet there are many cases in which the effect may be indirectly obtained by an order merely restrictive. Thus, in the case of *Robinson v. Lord Byron*, the effect was obtained by an injunction restraining the defendant from preventing the water from flowing in such regular quantities as it had ordinarily done before the day on which the alleged nuisance commenced (*x*). In *Lane v. Newdigate* (*y*), a similar effect was obtained by restraining the defendant from impeding the plaintiff from navigating, using, and enjoying, by continuing to keep the canals, banks, or works out of repair, by diverting the water or preventing it by the use of locks from remaining in the canals, or by continuing the removal of a stop gate.

After answer.

Special injunctions may be obtained at almost any stage of the cause; they may be moved for either after answer or before an-

(*q*) *Rolls v. Miller*, Toth. 144.

(*r*) 1 Ves. 543.

(*s*) *Anon.* 1 Ves. J. 140.

(*t*) *Lane v. Newdigate*, 10 Ves. 192; vide etiam *Blakemore v. The Glamorganshire Canal Comp.* 1 M. & K. 154.

(*u*) 11 Sim. 47.

(*x*) 1 Bro. C. C. 588, *Perkins's* ed. notes].

(*y*) 10 Ves. 192, [Sumner's ed. note (*a*), and cases cited]

They are also very often granted before appearance; After Answer.  
In cases, they will be ordered without notice to the  
to be restrained and before he has been actually  
*subpoena*.

seeks to restrain the defendant from proceeding in  
Law, and the defendant is diligent enough to prevent  
injunction from issuing, by filing a sufficient answer  
limited by the order of the Court (z), the only way  
plaintiff can obtain an injunction is by moving for  
merits confessed in the answer (1).

for this purpose is special, and notice of it must be  
at least seven days before the day of making it (a); and it is to  
that, where an injunction is sought against several  
though a plaintiff may be entitled to a common in-  
junction against one or more of them, yet if the other  
against whom the injunction is sought, have answered,  
move specially for it (b).

observed that the granting a special injunction upon  
merits confessed in the answer, is not confined to injunctions  
granted at Law, but will be extended to injunctions to  
restrain the defendant from doing any act which the Court is in the habit of prohib-  
iting, and that, in hearing the application, the Court is  
to apply the same rules, with relation to affidavits, as in the  
case of a motion to restrain proceedings at Law; Plaintiff strict-  
ly tied down  
to merits con-  
fessed in an  
answer.  
Moving for a special injunction upon the merits con-  
fessed in the answer, the plaintiff is as strictly tied down to read-  
ing affidavits in support of his case, as he is in showing cause  
against dissolving the common injunction; and he  
must read affidavits in those instances in which they are al-  
ready read in that case (c).

If the defendant has, at the time of the motion for the in-  
junction, answered to the bill, a question frequently arises  
Practice as to  
reading affi-  
davits when a  
motion is made  
for an injunc-  
tion after  
answer.

913. (c) Ante, p.1827-8; et vide Smythe  
796. v. Smythe, 1 Swanst. 252.  
Flindt, Wightwick,

answer admits the equity of an injunction bill, but sets up  
a defence, the injunction will be continued until the hearing. M.  
v. M., 2 Dev. & Bat. 19; Minturn v. Seymour, 4 John. Ch. 497;  
Edge, 1 Dev. & Bat. 38. And on a motion to dissolve, the  
opinions of the answer are alone to be regarded, not the opinions of the  
motion. See v. Manhardt, 1 Bland, 335.

Practice as to  
reading Affidavits.

When answer  
denies title.

of some nicety concerning the right of the plaintiff to read affidavits tending to controvert the statements in the answer (1).

In the first place, if the answer deny the *title* of the plaintiff it seems that affidavits cannot be read in contradiction to such denial; and with regard to the particular fact or title, it is said to be immaterial whether the affidavits are filed before or after the answer (d) (2).

With respect, however, to acts of waste and other acts analogous thereto, the plaintiff may read affidavits against the answer if they are filed before it (e) (3).

When the  
answer is put  
in before the  
affidavits filed.

If, however, the answer should be put in before any affidavits are filed, then, whether the notice of motion for the injunction should have been given before or after the answer (f), in either case the affidavits even as to these facts are inadmissible.

When some  
affidavits have  
been filed be-  
fore answer.

When, however, affidavits having been filed, an answer is subsequently put in, the plaintiff is, in some cases, permitted to read further affidavits filed after the answer strengthening the case

(d) *Manser v. Jenner*, 2 Hare, 603; (e) *Atkinson v. Kemble*, 7 Sim. see also *Hanson v. Gardiner*, 7 Ves. 638; *Glassington v. Thwaites*, 1 B. 311, [Sumner's ed. 305, note (a)]; & S. 134. *Berkeley v. Brymer*, 9 Ves. 355; (f) *Manser v. Jenner*, 2 Hare, *Norway v. Rowe*, 19 Ves. 150; *Clapham v. White*, 8 Ves. 35. 609; *Smythe v. Smythe*, 1 Sw. 222.

(1) In *Poor v. Carleton*, 3 Sumner, 83, Mr. Justice Story remarks, "The practice in America has, I believe, become more liberal, than it is in England; and if it were necessary, I should not hesitate to admit affidavits to contradict the answer, for the purpose of continuing or even of granting a special injunction, where I perceived that, without it, irreparable mischief would arise. In the present case, there are circumstances, which might free me from the necessity of asserting so broad a doctrine. But I wish rather to dispose of the case upon the general ground, that the granting and dissolving injunctions in cases of irreparable mischief, rest in the sound discretion of the Court, whether applied for before or after answer; and that affidavits may after answer be read by the plaintiff to support the injunction, as well as by the defendant to repel it, although the answer contradicts the substantial facts of the bill, and the affidavits of the plaintiff are in contradiction of the answer." See ante, 1826, 1827, 1831, and notes.

On an application for an injunction the plaintiff may read affidavits filed before the coming in of the answer, in support of the bill, or in contradiction to the answer, but no affidavits filed subsequently to the coming in of the answer can be read. So held in *Kinsler v. Clarke*, 2 Hill Ch. 620. But affidavits may be added to the case made by the bill, after answer, as to collateral matters. *Shaw v. Wier*, 1 Irish Eq. 213.

(2) See *Poor v. Carleton*, 3 Sumner, 80, 81; *Eden Injunct.* (2nd Am. ed.) 384, ante, 1826, note; *Powers v. Heery*, R. M. Charl. 523; *Higgins v. Woodward*, 1 Hopk. 342.

(3) In New York, where the plaintiff waives an answer on oath, if he annexes to, and files with, his bill, affidavits of other persons verifying the facts stated therein, it is not a matter of course to dissolve the injunction on the oath of the defendant. See *Manchester v. Day*, 6 Paige, 295; *Rule of Chancery*, 37. See also note (1), above; ante, 1826, note, 1831, note.

made by the first affidavits (1); and if after the answer both plaintiff and defendant file affidavits, it seems that the answer will in general be only treated as itself—an affidavit (g). Injunction before Answer.

The case of *Maden v. VEVERS* (h), further illustrates the rules of the Court upon the subject. There after answer the original bill was amended, and the defendant obtained time to answer it; the plaintiff then gave notice of motion for a special injunction, and filed affidavits in support of it. The motion coming on, the defendant obtained time to answer the affidavits, and then filed both her answer and affidavits in opposition. Under these circumstances, Lord Langdale, M. R., held that the second answer must be treated as an affidavit, and that the affidavits in support of the motion might be used to qualify the second, but not the first answer. Affidavits filed between two answers allowed to qualify the second, but not the first answer.

In *Smith v. Cleasby* (i), the injunction was obtained, *ex parte*, after which an answer was put in, and the defendant hereupon served a notice of motion to dissolve the injunction. Exceptions were taken to the answer, to which the defendants submitted, and then filed a further answer. Between the filing of the exceptions and the further answer, the plaintiff made affidavits. The defendant then moved to dissolve on the notice served prior to the putting in of the further answer; and the V. C. of England held that the affidavits so filed by the plaintiff, might be read on the hearing of the motion. The V. C. of England has laid it down as a general rule that when a motion to dissolve an injunction is ordered to stand over at the plaintiff's request, affidavits filed after ten o'clock of the day, for which notice is given, cannot be read on the motion (k) (2). Affidavits filed after insufficient answer admitted.

When motion to dissolve an injunction stands over time for filing affidavits.

(g) *Gardiner v. M'Cutchen*, 4 (i) 10 Sim. 91.  
 law. 534. (k) Anon. 10 Sim. 50.  
 (h) 5 Beav. 503.

(1) See the next two preceding and the next succeeding note; ante, 1826, etc.

(2) In New York, where the plaintiff waives an answer on oath and relies upon the affidavits of third persons annexed to the bill, to sustain an injunction, in opposition to the defendant's answer on oath denying the equity of the bill, the defendant, on an application to dissolve the injunction, may also read the affidavits of third persons in support of his answer. *Haight v. Case*, Paige, 525; *Brown v. Hall*, 5 Paige, 235. See *Village of Seneca Falls v. Mathews*, 9 Paige, 504. But where a preliminary injunction is granted absolutely, in the first instance, and the defendant applies to have it dissolved on the ground that the whole equity of the bill is denied by the answer, he cannot be allowed to read affidavits in support of his answer, except where his answer itself is not conclusive, under the last clause of the 37th Rule in Chancery, N. York. *Village of Seneca Falls v. Mathews*, 9 Paige, 504.

In *Eastburn v. Kirk*, 1 John. Ch. 444, it was held, that the admission of *ex parte* affidavits is an exception to the general rule, and is allowable only in cases of waste, or in cases where irreparable mischief might ensue. See

Injunction  
before Answer  
Before answer.

Without no-  
tice to the de-  
fendant.

It is obvious that, in many cases in which the Court interferes by injunction, the benefit of its interference would be lost, if the plaintiff were to be obliged to wait till the defendant had answered his bill, before he moved for the writ (1). The nature of the act to be prohibited is frequently such that the immediate stoppage of it is absolutely necessary in order to protect property from destruction, as in the case of waste by the cutting of timber, pulling down houses, &c.; consequently the delay which must occur before the defendant can be compelled to put in an answer might, in many cases, be productive of irreparable injury to the plaintiff, by affording an opportunity for the performance of the act intended to be restrained, before the injunction can be issued to prevent it. Indeed, in some cases, the mere act of giving notice, to the defendant, of the intention to make the application, might be, of itself, productive of the mischief apprehended, by inducing him to accelerate the act in order that it may be complete before the time for making the application shall have arrived. To obviate these inconveniences, the Court has adopted the practice of granting injunctions, before answer, upon affidavits verifying the plaintiff's case, and showing the grounds he has for apprehending that an act is about to be committed, which, if not prevented, will be productive of injury which the Court considers as irreparable; and it will also, in cases where there either is not time to give notice, or there is reason to apprehend that the giving notice of

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also to the same effect, *Hoffman v. Livingston*, 1 John. Ch. 211; *Roberts v. Anderson*, 2 John. Ch. 204; *Leroy v. Dickinson*, 1 Car. Law Repos. 497; *Merwin v. Smith*, 1 Green Ch. 182; *Bellona Co's. case*, 3 Bland, 442; *Moore v. Reed*, 1 Ired. Eq. 418. In *Benton v. Gibbon*, 2 Hayw. 136, affidavits were allowed to be read in support of a bill for an injunction against the answer, and the injunction continued. In cases of waste affidavits are admissible in support of the bill to prove acts of waste. *Merwin v. Smith*, 1 Green Ch. 182; *Eden on Injunct.* (2nd Am. ed.) 384; *Morphet v. Jones*, 19 Vesey, 350.

Where new matter is contained in the answer, not responsive to the bill, which is relied on as the ground for setting aside the injunction, the plaintiff may read affidavits in opposition to such new matter. *Merwin v. Smith*, 1 Green Ch. 182; ante, 1826, note. Upon a motion to dissolve an injunction the answer is to be regarded only so far as it is responsive to the bill. *Hardy v. Summers*, 10 Gill & John. 317. See *Bellona Co's. case*, 3 Bland, 442.

(1) It is only in cases of great urgency, or where irreparable mischief may ensue, that an injunction will be granted before answer. *New York Printing Co. v. Fitch*, 1 Paige, 97; *Hartridge v. Rockwell*, R. M. Charl. 264, 265; *Ogden v. Kip*, 6 John. Ch. 160, 161. The object of an injunction before answer is to preserve all things in their then condition; not to determine any right by anticipation, or to undo or restore any thing. *Murdock's case*, 2 Bland, 461.

the application would lead to the performance of the act to be prohibited, award the injunction without notice, or even before service of the subpoena (1). Injunction before Answer

The most usual case in which special injunctions are granted upon affidavit, before answer, are those of waste, or nuisance, by obstructing ancient lights, or trespass. The Court will also grant an injunction before answer, to restrain any of those acts, the performance of which, before the defendant's time for answering is expired, would either defeat the object of the suit or cause serious injury or inconvenience to the party applying (2). To restrain waste, nuisance, or trespass. — the infringement patents, &c.

Thus it will prevent the printing of books, or the infringement of a copyright, on the filing of a bill; but, in such cases, as the equitable relief entirely flows from the legal right, the application must be supported by an affidavit of title (1); and, in the case of a patent, it is incumbent on the party making the application to swear as to his belief, at the time of making the affidavit, that the invention was new or had never been practised in this kingdom at the date which the patent bears (m). — or of copyrights,

The Court will likewise enjoin, *ex parte*, the negotiation of a bill of exchange, where it has been fraudulently or improperly obtained, or if it is absolutely void in its creation; for as it would be a good bill of exchange, and, therefore, a negotiable instrument in the hands of a *bona fide* holder, the plaintiff has a right to be protected from that danger, and the mischief attending to it (n) (3). Thus, also, it will prevent the personal representative of a testator from receiving his assets when he is either insolvent, or wasting the property in such a manner that there is a great danger of its being lost, although it is admitted that to induce the Court to interfere against an executor, and especially before answer, a strong — or the negotiation of a security. To restrain receipt of assets by representative.

(1) *Platt v. Button*, 19 Ves. 447; (n) *Smith v. Haytwell*, Amb. 66; ante, p. 391. *Hood v. Aston*, 1 Russ. 412; *Lloyd v. Gurdon*, 2 Swanst. 180.  
(m) *Hill v. Thompson*, 3 Mer. 624; *Sturz v. De la Rue*, 5 Russ. 328; ante, p. 1864.

(1) In cases of great urgency, or where irreparable injury may ensue, as in waste, &c. where the application follows quickly after the injury complained of, the Court will grant the injunction without notice, or appearance, or subpoena served. *Hartridge v. Rockwell*, R. M. Charl. 260.

(2) See *Mayor, &c. Rochester v. Curtiss*, 1 Clarke, 336.

(3) See 2 Story Eq. Jur. § 906; *Darst v. Brockway*, 11 Ohio, 462.

Injunction  
before Answer.

— or the  
conveyance of  
an estate.

Not to restrain  
proceedings at  
law.

Injunctions to  
stay proceed-  
ings at law not  
then granted  
specially.

Except in par-  
ticular circum-  
stances.

special ground must be made (o). An injunction will likewise be ordered, before appearance, to restrain a vendor who has contracted to sell his property to another, from conveying away the legal estate in the premises, because the plaintiff might be put to expense by the necessity of making another party when the cause was just ready for hearing (p); and the Court has, moreover, as we have seen, granted an injunction, before answer, to restrain the trustees of a presbyterian chapel from employing or permitting any person, who was not a licentiate or ordained minister of the Church of Scotland, to preach or officiate in the chapel (q).

It may be observed here, that injunctions to restrain proceedings at Law will not, in general, be granted specially upon affidavit before answer; the proper course, where the defendant brings the action, by putting in his answer, prevents the plaintiff having an opportunity of obtaining the common injunction, is, to move for the injunction upon the answer; and the rule that a special injunction, in such cases, will not be granted before answer has been extended to cases in which an action has been brought by an assignee of a bond or other *chose in action*, in the name of the assignor; in such case, the Court will not grant a special injunction against the assignee, to restrain the action, but the plaintiff must wait till the assignor is in contempt, or has answered (r); though, it seems, from the decision of Lord Lyndhurst, in *Montague v. Hill* (s), that, where a common injunction has been obtained, the answer of the assignor cannot be read in opposition to a motion to dissolve the injunction made by the assignee.

Special injunctions to restrain proceedings at Law will also be refused where the sole ground for the application is, that the plaintiff at Law will otherwise be entitled to sue out execution before the common injunction can be obtained (t).

We have seen that hereafter common injunctions may be obtained at all times, as well during term time as during vacation, so that the inability to obtain the common injunction as of course, will not now be a reason why a special application for it should be permitted (u).

Where the Court in which the action is brought has a practice which renders it impossible for the defendant at Law to obtain the

(o) *Middleton v. Dodswell*, 13 Ves. 266; *Mansfield v. Shaw*, 3 Mad. 100.

(p) *Echliif v. Baldwin*, 16 Ves. 267.

(q) *Milligan v. Mitchell*, 1 M. & K. 446; ante, p. 1874.

(r) *Lord Portarlington v. Graham*, 5 Sim. 417.

(s) 4 Russ. 128; vide etiam, *Thorp v. Hughes*, 3 M. & C. 742.

(t) *Franklyn v. Thomas*, 3 Mer. 225, (n).

(u) *Annesley v. Rookes*, 3 Mer. 226, (n).

common injunction in sufficient time to answer any useful purpose (x), special injunctions have, as we have already seen, been granted upon affidavit to restrain proceedings (y). This has also been done to restrain proceedings at Law in an outlawry, where the plaintiff in Equity had received no notice of the action, and had not, therefore, an opportunity of obtaining the common injunction (z).

Before  
Answer.

It is to be observed, however, that although the Court will, in cases where the plaintiff in Equity could have had no opportunity of obtaining the common injunction, relax its rule, and grant an injunction to restrain a proceeding at Law against him upon affidavit before answer, it will not do so where the plaintiff in Equity, having had notice of the proceeding at Law, might have placed himself in a situation which would have entitled him to apply for the common injunction: thus where an ejectment was brought against the tenant of the plaintiff in Equity, of which the plaintiff had notice, but omitted to make himself a party to defend the ejectment, (which he might have done by rule of the Court in which the ejectment was brought,) Lord Eldon refused to grant an injunction, *ex parte*, to restrain the defendant from taking out execution on the judgment which he had obtained in the ejectment against the tenant, on the ground that the plaintiff, as landlord, might have made himself a party to the ejectment, and then have obtained the injunction in the ordinary way; and that if he were to grant such an injunction, it would lead to this practice, viz. — 'that the landlord, if convenient to him, would not make himself a defendant to the action, but would wait till it was over, and then apply for an injunction upon affidavit' (a).

— but not plaintiff might have placed himself in a situation to obtain common injunction.

Where a special injunction is applied for before answer, the application must be made by *motion*; it is stated, however, in some of the books, that if the application be made in vacation, when the Court does not sit, as no motion can be made, a Judge of the Court may grant the application upon petition (b); this, however, is not universally the case in practice, as, although applications for injunctions during vacation are sometimes made upon petition, the more common course is to apply by motion, supported by affi-

Application must be by motion.

(x) *Hind v. Fiddes*, 2 S. & S. 370.

(y) *Jones v. Basset*, *Bevan v. Reid*, 2 Russ. 405.

(z) *Drummond v. Pigou*, 2 M. & K. 169.

(a) *Moses v. Lewis*, Jac. 502.

(b) *Eden on Injunc.* p. 320; *Prac. Reg.* 252; *Smith v. Clarke*, 2 Dick. 455; *Nichols v. Kearsley*, ib. 645; *Chamberlayne v. Dummer*, 1 Bro. C. C. 166 [Perkins's ed. notes].



Before An-  
swer.

davit of the plaintiff's title, and of the facts from which he is ~~in-~~  
duced to apprehend that the act to be restrained is about to ~~be~~  
committed; and producing, at the same time, a certificate duly  
signed by the Clerk of Record and Writs of the fact of the bill  
having been filed.

Affidavit for  
special in-  
junction by  
whom sworn.

An affidavit in support of an application for a special injunc-  
tion before answer, is usually sworn by the plaintiffs, or some of  
them, but may be sworn by any person acquainted with the facts  
(c) (1); thus an injunction was granted to restrain the publication  
of a work sold as the plaintiff's, upon affidavit by the plaintiff's  
agent, the plaintiff himself being abroad (d).

Must be sworn  
after bill filed,

— and office  
copy must be  
in Court.

The affidavit must also be sworn *after* the bill is filed, other-  
wise it cannot be read, not having been made in a cause; and it  
seems that the office copy of the affidavit must also be in Court  
at the time when the injunction is moved for; and, in a recent  
case, the V. C. of England discharged an injunction, on the  
ground, that the office copies of the affidavits, upon which it was  
granted, were not actually in Court when the order was pronoun-  
ed (e).

Affidavits as to  
title.

As to the contents of the affidavits to obtain an injunction, it is  
in general necessary that a plaintiff should swear positively to his  
title. An injunction has been refused where a plaintiff merely  
swore, upon his *information and belief*, that he was a remainder-  
man under a settlement (f). An averment that the plaintiff is enti-  
tled in fee simple has also been considered insufficient, as being *too*  
*general*; he must set out his title *particularly* (g), and if the  
plaintiff's right appears to be *doubtful*, the Court always refuses  
to interfere (h) (2).

(c) 1 Smith, 595.

(d) Lord Byron v. Johnston, 2 Mer.  
29.

(e) Jackson v. Cassidy, 10 Sim.  
326.

(f) Davis v. Leo, 6 Ves. 784.

(g) Whitelegg v. Whitelegg, 1  
Bro. C. C. 57 [Perkins's ed. notes].

(h) Field v. Jackson, 2 Dick. 599;  
Rotherham v. Fanshaw, 3 Atk. 638.

(1) See Campbell v. Morrison, 7 Paige, 157; Bank of Orleans v. Skin-  
ner, 9 Paige, 305, cited ante, 1834, note.

(2) Whitelegg v. Whitelegg, 1 Bro. C. C. (Perkins's ed.) 57, note (e), and  
cases cited; Amelung v. Seekamp, 9 Gill & John. 468; Beatty v. Beatty, 2  
Moll. 541; Storm v. Mann, 4 John. Ch. 21; Duvall v. Waters, 1 Bland, 576;  
Joley v. Stockley, 1 Hogan, 247; Lowe v. Lucey, 1 Irish Eq. 93; S. C. 1  
Craw. & Dix, 634.

There must be positive evidence of actual title, 2 Madd. Ch. Pr. (4th Am.  
ed.) 218; Jeremy Eq. Jur. 335, 336; Hough v. Martin, 2 Dev. & Bat. 379;

he same principle it is, as we have seen (i), required an *ex parte* application to restrain the violation of a patent the plaintiff should swear as to his belief at the time *the application*, (and not as to his belief at the time he got the patent,) that he is the original inventor (k). So upon an application to restrain an infringement of copyright, by an assignee of the copyright, the plaintiff (since the recent determinations at Law) must swear that the assignment was in writing; though, if he is not an assignee, it will be sufficient to state the assignment under which he himself claims, without producing the assignment to his assignor.

Before Answer.

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— in cases of patent.

What must be proved by affidavit in cases of copyrights.

plaintiff should also, by his affidavit, state some actual **Must prove facts of injury.**  
of his rights, or a sufficient ground to apprehend it;  
cases of waste, an affidavit merely as to his apprehen-  
sion that the defendant intends to commit waste, without  
any grounds for it, will not be sufficient; there must either  
be some act, like the marking trees, sending a surveyor, or some  
(1).

**speaking, after appearance** by the defendant, an injunction not to be ordered, unless upon notice; but in cases of **this will not be required (m)**; and, in *Aller v. Jones (n)*, **he said**, that if a person about to commit waste, and **whom a bill was filed, could, by appearing the evening before the motion, prevent it, he would get two days for cut-**

p. 1864; but in Lord Bynston, 2 Mer. 29, where I was abroad, and an inas applied for on his be- is agent, to restrain the of a book in his name, granted the injunction, affidavit of the agent, who wear positively that the as not the author of the tated circumstances which rly probable that he was ndant (who was served

with the notice of the application) refusing to swear to his belief that it was so.

(k) *Hill v. Thompson*, 3 Mer. 624.

(l) *Gibson v. Smith*, 2 Atk. 182; *Barnard*, 491, S. C.; *Jackson v. Cator*, 5 Ves. 688; *Hanson v. Gardiner*, 7 Ves. 309; *Etches v. Lance*, ib. 417; *Hannay v. M'Entire*, 11 Ves. 54.

(m) Marasco v. Bilton, 2 Ves. 112; Harrison v. Cockerell, 3 Mer. 1; Col-  
lard v. Cooper, Mad. & Geld. 190.

(π) 15 Ves. 605.

1. Pr. (2nd Am. ed.) 596; Price v. Meth. Epis. Church, 4 Ham.

*v. Dews*, R. M. Charl. 358, it is said that the general principle stated from the books is, that the person applying for an injunction has an actual or probable right. See also *Georgia v. Brailsford*, 2 115.

one has the power and threatens to do the wrong, an injunction issued. *M'Arthur v. Kelly*, 5 Ohio, 139. But an injunction granted to prevent a threatened wrong, unless the danger is imminent the injury is irremediable in any other form. *Spooner v. McLean*, 328; *Mayor, &c. Rochester v. Curtis*, 1 Clarke,

Before Answer.

ting timber. In *Perry v. Weller* (o), a distinction appears to have been recognised between a *gratis* appearance and an appearance entered upon service of a subpoena; it seems, however, that, where the threatened mischief is imminent and would be irremediable, the Court has not required notice, even though the appearance had been the consequence of a subpoena (p).

Before appearance upon certificate of bill filed.

It is not often, however, that, where an injunction is required to prevent irreparable mischief, a defendant has an opportunity of appearing before the order can be made, the usual practice being to apply for the injunction before the subpoena is issued, and immediately upon the filing of the bill (of which a certificate signed by the Clerk of Records and Writs must be produced at the time of the application); in which case, upon its being shown to the Court, by affidavit, that the case is urgent and the injury likely to be irreparable, an order will be made for the injunction directing the subpoena to be served at the same time with the writ (l). This practice has been long adopted in cases of waste, or of piracy, or of infringement of patents, and has been extended to restrain the negotiation of bills of exchange, or other negotiable instruments (q).

Without notice subpoena to be served with the injunction.

It has also been acted upon in cases of obstruction of ancient lights (r), and in many other cases, where the danger to the interest of the party applying was imminent: thus where a foreign vessel was driven into Plymouth by stress of weather, Lord Eldon, at the instance of the supercargo and part owner, granted an injunction to prevent the master from selling the ship's cargo, &c., till answer or further orders, upon an affidavit that he had heard the

(o) 3 Russ. 519.

(p) Vide *Acraman v. Bristol Dock Company*, 1 R. & M. 321, and the cases there cited *notis*.

(q) *Patrick v. Harrison*, 3 Bro. C. C. 476; — *v. Blackwood*, 3 Anst. 851; *Smith v. Haytwell*, Ambl. 66. Lord Eldon held that the same principle prevails where a plaintiff, having obtained the common injunction to restrain proceedings at Law on such an instrument, moves, upon affidavit, to extend the injunction to

prevent its negotiation; and that, in such cases, notice of the application is unnecessary, since the very intimation might produce the mischief apprehended, and the instrument get into the hands of a *bona fide* holder for valuable consideration. Vide Mr. Bell's Edn. of Brown's C. C. vol. 3, p. 477, n. 4.

(r) *Atty.-Gen. v. Nichol*, 16 Ves. 338; 3 Mer. 687, S. C.; *Beck v. Stacy*, 2 Russ. 121.

(1) Where an injunction is granted *ex parte*, upon the filing of the bill, it is irregular for the plaintiff to serve the injunction upon the defendant, without serving him with the subpoena to appear and answer. *Parker v. Williams*, 4 Paige, 439; *Seabor v. Hess*, 5 Paige, 85; *Patrick v. Jackson*, 3 Bro. C. C. (Perkins's ed.) 476, 477, notes.

again was about to do so, and on certificate of bill filed (*s*). In *Williams v. Williams* (*t*) an injunction was granted, in like manner, to restrain the proprietor of a coach, who had sold the goodwill of his business and undertaken not to set up another coach on the same road, from running a coach contrary to his undertaking. So also, where the representatives of a mortgagor had obtained mortgage deeds from the mortgagee, by fraud, Lord Eldon, on affidavit and certificate of bill filed, granted an injunction to restrain the defendants from selling or mortgaging the estate, and decreed the deeds to be brought into Court immediately (*u*).

It sometimes happens that, upon an application, *ex parte* for an injunction, the Court will, if it thinks that the case is so urgent as to require its immediate interference, or that the affidavits in support of it are not positive enough, order notice of the application to be given to the defendant (*x*) (1). In such cases, if the defendant has not appeared, the notice of motion must express that notice has been obtained of the Court to serve it (*y*).

There appears to have been, formerly, some doubt as to the necessity in cases of *ex parte* injunctions directing the *subpoena* to be served with the injunction, and the practice seems to have been various (*z*). The rule, however, is now settled, and the service of a *subpoena* is invariably required to be made at the same time the injunction is served, and it is said, that the Court generally directs that, when the service takes place, the party shall be advised that he is at liberty to apply for a dissolution of the injunction, as he may be advised (*a*) (2).

Before Answer.

Upon application of a mortgagee.

In what cases Court will direct notice of motion to be given.

Rule as to serving *subpoena* with *ex parte* injunctions.

*Delafield v. Guzanbens*, M. S. (y) Ante, p. 1792.  
*Arch.*, 1800. (z) Vide Atty.-Gen. v. Nichol, ubi  
*2 Summ.* 253. supra.  
*Wells v. Willis*, Nov. 1802. (a) Vide 3 Bro. C. C. ed. Belt.  
*Vide* Ld. Byrd v. Johnston, 477, n. 2.  
*r.* 20.

*Attorney-general v. Utica Ins. Co.* 2 John. Ch. 375; *Mayor, &c. London v. Bolt*, 5 Sumner's Vesey, 129, note (a).

*Parker v. Williams*, 4 Paige, 439; *Halst. Dig.* 178; *Seabor v. Hess*, 85; *The Mayor, &c. of London v. Bolt*, 5 Sumner's Vesey, 129, (a).

There is no ground for dissolving an injunction, that the *subpoena* could not be served; nor that the injunction itself was served illegally, or without the sanction of the Court. *Corey v. Voorhies*, 1 Green Ch. 5. See *West* v. *ib.* 309. But an injunction was dissolved on the appearance and answer of the defendant, because it did not appear that the plaintiff had endeavored to have the process served. *Hightour v. Rush*, 2 Hayw. 361. See *v. Smith*, 1 Green Ch. 309; *Payne v. Cowan*, 1 Smodes & Marsh. 7.

Where the plaintiff neglects to serve a *subpoena* upon a defendant against whom an injunction has been granted affecting his rights, such defendant

Form of  
Orders.  
Duration of  
injunction.

Extended to  
agents and  
workmen, al-  
though not  
prayed.

In what cases  
service of  
order or min-  
utes instead  
of writ will be  
sufficient.

The orders pronounced by the Court in cases of special injunctions before answer, have varied at different periods (b). The form most frequently adopted enjoined the party 'till further order (c).' In some cases the injunction has been till 'appearance and further order (d);' in others till 'answer and further order (e).' But the form at present used, and which is established by a rule laid down by Lord Eldon, is 'till answer or further order' (1). This has been adopted as giving defendant the liberty to move, if necessary, to dissolve upon affidavit, before he has answered the bill (2); and it may be observed, that although, in cases of waste and trespass, the bill and notice of motion should pray an injunction against the defendant only, it is invariably extended, by the order, to his servants, agents, and workmen (f).

An order for a special injunction, having been obtained, must be drawn up, passed, and entered in the same manner as any other order. It frequently happens, however, (especially if the order is made in vacation, when the offices are closed,) that the matter is so urgent that the object of the injunction might be defeated if the party were bound to wait till the order could be passed and the writ issued upon it; in such cases, the practice is to serve the party *personally* with notice in writing, that the injunction has been ordered, and that it will be sealed and served as soon as it

(b) It is said, in *Cary*, to have been usual to grant injunctions on surmises, with a proviso *si ita sit*.; *Fodringham v. Chomely*, *Cary*, 53; *Aschughe v. Shelton*, ib. 56.

(c) *Lane v. Newdigate*, 10 Ves. 192.

(d) *Lord Grey de Wilton v. Saxton*, 6 Ves. 106.

(e) *Potter v. Chapman*, 1 Dick. 146; *Robinson v. Lord Byron*, 1 Bro. C. C. 588 [Perkins's ed. notes]; 2

Dick. 703. It is by mistake stated, in Mr. Coxe's Report, to have been till 'answer or further order,' Reg. Lib. B. 1784, fol. 143; *Drury v. Molins*, 6 Ves. 328; *Lord Tanworth v. Lord Ferrers*, ib. 419.

(f) *Humphreys v. Roberts*, cited Seton on Decrees, 305; *Chamberlayne v. Dummer*, ib. 306; *Mount v. Fenner*, ibid. 310; *Bainbridge v. Briggs*, ib. 311; *Jefferys v. Bowles*, ib. 312.

may appear voluntarily and apply to have the injunction dissolved, without waiting for the service of the subpoena. *Waffle v. Vanderheyden*, 8 Paige, 45.

(1) *Read v. Dews*, R. M. Charl. 360, 361; *Read v. Consequa*, 4 Wash. C. C. 174. Where an injunction is granted until the answer comes in, the injunction is not dissolved by the coming in of the answer, but is a subsisting injunction until it is dissolved by subsequent order. *Turner v. Scott*, 5 Rand. 332. But see *Beal v. Gibson*, 4 Hen. & Munf. 481.

(2) Injunctions may be dissolved before answer filed, or afterwards, or after demurrer. *Jones v. Com. Bank of Columbus*, 5 Howard (Miss.) 43.

In cases of irreparable mischief, the dissolution of an injunction rests in the sound discretion of the Court, whether applied for before or after answer. *Poor v. Carleton*, 3 Sumner, 70; ante, 1883-4-5, note; 1826, 1831, notes; *Read v. Dews*, R. M. Charl. 358; *Read v. Consequa*, 4 Wash. C. C. 174; *Minturn v. Seymour*, 4 John. Ch. 173.

can be passed through the offices, or else to procure a transcript of the minutes of the order signed by the Registrar, and to serve the same personally by delivering a copy of it, showing, at the same time, the original transcript so signed; and either the notice or the copy of the minutes will be sufficient to render the defendant guilty of a contempt if he acts in opposition to the injunction (*g*). In such case, however, there must be no delay in endeavoring to get the order drawn up and the injunction under seal, and serving it when obtained (*h*). Practice upon issuing injunctions.

A special injunction is prepared (1), sealed, and served, in precisely the same manner as a common injunction.

Formerly where special injunctions were granted "till answer *and* further order," they might be dissolved like the common injunction by an order *nisi*, on the coming-in of the answer (*i*), or by an original motion on the coming-in of the answer, without an order *nisi* (*k*); but, since special injunctions have been granted "till answer *or* further order," the defendant may either apply to dissolve it, before answer (*l*) (2), or he may wait till his answer has been put in before he takes that step, in which case he may do so without a previous order *nisi* (*m*). How prepared and served.  
  
Dissolution of.

In either case, however, he must proceed by special motion, the rule of the Court being that an injunction cannot be dissolved, unless upon motion in open Court (*n*). Must be by motion.

It seems that where a special injunction is granted against several defendants, one of them cannot move to dismiss in the absence of the rest (*o*). When against several defendants.

(*g*) *Vansandau v. Rose*, 2 J. & W. 364; 1 Smith, 598.

(*h*) *Vansandau v. Rose*, ubi sup.

(*i*) *Seton on Decrees*, 314; et vide *Countess of Strathmore v. Bowes*, 2 Dick. 675; *Trusler v. Cummings*, L. C. 26 April, 1773, R. L. B. 1772, fo. 432.

(*k*) *Seton on Dec.* 314; *Norton v. Aylett*, ib.; *Mount v. Turner*, 2 Dick. 793.

(*l*) *Vivan v. Mortlock*, 2 Mer. 479; *Earnshaw v. Thornhill*, 18 Ves. 488.

(*m*) *Countess of Strathmore v. Bowes*, ubi supra.

(*n*) *Eden on Injunc.* 326. Occasionally, however, in pressing cases, the Lord Chancellor has appointed a special hearing at his house for the purpose, ib.

(*o*) *Thompson v. Geary*, 5 Beav. 131.

(1) A writ of injunction ought to be sufficiently explicit on its face to apprise the party, upon whom it is served, as to what he is restrained from doing, without the necessity of his resorting to the plaintiff's bill to ascertain what the injunction means. *Sullivan v. Judah*, 4 Paige, 444; *Moat v. Holbein*, 2 Edw. 188.

It should be clear and explicit in its terms, and should not deprive the defendant of any rights which the case made by the bill does not require he should be restrained from exercising. *Laurie v. Laurie*, 9 Paige, 234.

(2) *Read v. Dewa*, R. M. Charl. 360, 361; *Read v. Consequa*, 4 Wash. C. C. 174; *Minturn v. Seymour*, 4 John. Ch. 173; *James v. Jefferson*, 4 Ben. & Munf. 483.

**Dissolution of.**  
**When motion**  
**for dissolution**  
**may be made.**

In term time, notice of motion may be given, for any day, without special leave, though, when it is wished to make it on a day not appropriated to the hearing of motions, it is usual, previously, to ask the leave of the Judge to bring it on on that day. When the motion is to be made during the sittings after term, if it be important that it should be made without waiting for a seal day, application should be made to the Court, before the notice of motion is served, for permission to give the notice of motion for a particular day, and the fact of such permission being given should be mentioned in the notice of motion (*p*).

**Rule as to**  
**reading affid-**  
**avits before**  
**answer.**

Where the application to dissolve an injunction is made before answer, it must be supported by affidavits on the part of the defendant in answer to those upon which the injunction was obtained, and the case, thus made by the defendant, may be met by counter affidavits on the part of the plaintiff (*q*), and, upon hearing the motion, the Court will judge between them (1).

**In what cases**  
**dissolved (2).**

If, upon hearing the motion to dissolve the injunction, the Court is of opinion that that it was improperly granted, or that the case made by the plaintiff is contradicted or not supported, it will order the injunction to be dissolved either with or without costs, as the justice of the case may appear to require (*r*). But if the defendant does not succeed in satisfying the Court that the injunction ought either to have been refused, or that it ought not to be continued, it will direct it to be continued until the hearing. And it is to be observed, that if, in the case of an injunction to restrain waste, or any thing of that description, the answer admits that the defen-

(*p*) Ante, p. 1518.

(*q*) But as to reading counter affidavits in reply, vide ante, p. 1797.

(*r*) From the case of *Hudson v. Maddison*, 12 Sim. 416, it appears that the defendant may avail himself

of any technical objection to the bill that would have been good upon demurrer, as an answer to the case made by the plaintiff for an injunction.

(1) See ante, 1883, note, 1827, 1828 and notes; *Read v. Dews*, R. M. Charl. 361.

(2) A want of due diligence on the part of the plaintiff after obtaining an injunction is always a cause for dissolving it. *Depeyster v. Graves*, 2 John. Ch. 904. See *Seeber v. Hess*, 5 Paige, 86; *Higgins v. Woodward*, 1 Hop. 342.

When an injunction has been allowed, the defendant, before answer, may move to dissolve the injunction on the ground of want of equity in the bill. *Minturn v. Seymour*, 4 John. Ch. 173; *Chesapeake & Ohio Canal Co. v. Baltimore & Ohio Rail Road Co.* 4 Gill & John. 7.

dant has committed waste, or has threatened to commit it (1), the injunction will be continued till the hearing (s) (2). Dissolution of.

It frequently, however, happens that, upon hearing the motion to dissolve the injunction, the Court is not satisfied with respect to the right of the plaintiff to maintain his injunction; in such cases, if the doubt arises upon the facts of the case, it will direct an inquiry by the Master, or an issue (t), or an action at Law (u), or, if the doubt arises upon the law, it will direct a case to be sent for the opinion of a Court of Law (z). In such cases, the Court usually dissolves the injunction, and, if the nature of the subject admits of it, as in the case of a piracy of a literary work or the infringement of a patent, it will direct an account to be kept, by the defendant, of the profits arising to him from the sale of the work, or of the article the sale of which is alleged to be an infringement of the plaintiff's right. In what cases an inquiry or issue or an action will be directed, and accounts directed to be kept.

It is to be remarked that, although the bill seeks merely an injunction, or an injunction with an account consequent upon the injunction, and the result of a reference to a Master, or of an issue, or an action at Law, or of a case for the opinion of a Court of Law, is unfavorable to the plaintiff's right to the injunction, the defendant cannot on that ground move to dismiss the bill. In *Brooke v. Clarke* (y), a motion of this nature was attempted, after a case at Law had been certified against the defendant, but Lord Eldon refused it, saying that upon the certificate from the Court of Law the case stood as if he had declared his own opinion to the effect that the plaintiff could not succeed in his motion for an injunction, and that the cause might still be brought to a hearing when the person who should preside might entertain a different opinion upon the title (3). Bill not dismissed after injunction dissolved. unless brought to a hearing.

(s) *Packington v. Packington*, 1 Dick. 101; *Atty.-Gen. v. Burrows*, 10 B. 128; *Anon.* 3 Atk. 485.  
(t) *Vide ante*, p. 1293-4.

(u) *Ibid.* 1319.  
(z) *Ibid.* 1322.  
(y) 1 Swanst. 550.

(1) As to injunctions for threatened injury, see *ante*, 1891, note.

(2) When the answer admits the equity of an injunction bill, but sets up an avoidance of it, the injunction will be continued until the hearing. *McNamara v. Irwin*, 2 Dev. & Bat. 19; *Minturn v. Seymour*, 4 John. Ch. 497; *Lindsay v. Etheridge*, 1 Dev. & Bat. 38. And on a motion to dissolve, the facts set forth in the answer are alone to be regarded, not the opinions of the defendant. *Chase v. Manhardt*, 1 Bland, 335.

(3) On the dissolution of an injunction, the plaintiff has a right to continue his case as an original suit, and, therefore, if the Court, without his consent, dismiss the bill at the same time the injunction is dissolved, it is error. *Blow v. Taylor*, 4 Hen. & Munf. 159.



**Dissolution of.** It is to be remarked, also, that although an injunction may be granted *ex parte* and sustained upon a motion to dissolve it, yet if, at the hearing of the cause, there be no evidence against the defendant, the bill will be dismissed (y).

**Injunction not sustained at the hearing without evidence.**

**Amendment of bill without prejudice to injunction.** It is to be recollected that, after a special injunction has been granted upon affidavit of merits, it is a matter of course to obtain leave to amend the bill "without prejudice to the injunction;" if, however, the bill has been already amended, and the plaintiff has to apply specially for leave, it may be necessary for him to establish an affidavit that the proposed amendments relate to facts of which the plaintiff had no knowledge, to have enabled him to bring them sooner before the Court (z) (1).

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SECT. IV.

*Of continuing or granting Injunctions at the Hearing.*

**Continued to the Hearing.** It frequently happens that where an injunction has been obtained before the hearing, upon an interlocutory application, it will be continued by the decree made at the hearing of the cause (a) (2).

**Provisionally.** Injunctions are continued at the hearing either *provisionally* or *permanently*. They are frequently continued provisionally pending a reference to the Master to make inquiries or to take an account preparatory to a final adjudication upon further directions (b).

**Permanently.** Injunctions are permanently continued or made perpetual by the decree in those cases where the party enjoined is in possession of some instrument conferring a legal right, which it is contrary to Equity that he should be permitted to exercise to the detriment of the plaintiff (1).

(y) *Barfield v. Kelly*, 4 Russ. 355. (a) *Seton on Dec.* 300.  
 (z) *Sharp v. Ashton*, 3 V. & B. (b) *Old v. Old*, *ibid.*  
 144; see *ante*, p. 487.

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(1) *Eden Injunct.* (2nd Am. ed.) 148, et seq. An injunction bill being sworn to by the party, it was held that it could not be amended without leave, in *Parker v. Grant*, 1 John. Ch. 434.

(2) The granting and continuing of injunctions lie in the sound discretion of the Court. *Roberts v. Anderson*, 2 John. Ch. 202.

(1) As a bond and mortgage void by reason of the obligor and mortgagee

Therefore where the plaintiff gave to the defendant three promissory notes for a particular purpose, on his undertaking to make no improper use of them, but afterwards the defendant, contrary to his promise, put the notes in suit against the plaintiff, who thereupon filed a bill praying that the notes might be delivered up to be cancelled, and that the defendant might be restrained, by injunction, from proceeding upon them, the Court, at the hearing, directed that a perpetual injunction should issue, and that it should extend to restrain the indorsing and further negotiation of the notes (c).

Where made perpetual.

As when he has promissory notes.

It is to be remarked, however, that the general course of the Court, where a party is in possession of a security or other instrument, which it is against conscience that he should use against the defendant, is to direct it to be delivered up and cancelled; a course which it will even adopt where the instrument is void in Law, although it has been sometimes doubted whether this remedy is applicable to cases of this description, as the circumstances which render the instrument void at Law might be shown or pleaded there to any action which might be brought upon such an instrument (d) (1).

More usual to order instrument to be delivered up.

— even where it is void at Law.

(c) *Chennel v. Churchman*, and *581, S. C.; 3 Woodeson Lect. 459, n. Minshaw v. Jordan*, Rolls, cited 3 S. C.; as reported in 2 Swanst. 150, n. Bro. C. C. 16; et vide *ibid.* ed. Belt, (d) Vide 2 Swanst. 457, n. where all cases on this subject are collected. *Chatel*, 1 Bro. C. C. 124; 2 Dick. *Simson v. Lord Howden*, 3 M. & C. 97.

being under age. *Colcock v. Ferguson*, 3 Desaus. 482. See *Allen v. Minor*, 2 Call, 70. So a recognizance, where bail having become fixed at law, are, under the equity of the case, entitled to be discharged. *Rathbone v. Warner*, 10 John. 587. So a judgment rendered on a bond obtained by fraud. *Kruson v. Kruson*, 1 Bibb, 184. So a judgment which is satisfied. *Brinckerhoff v. Lansing*, 4 John. Ch. 69. So a void judgment, though it is obvious the party seeking the aid of Equity could obtain relief in a Court of Law. *Caruthers v. Hartsfield*, 3 Yerger, 366. An injunction will be made perpetual, to prevent the record of a deed void, as forged and fraudulent, from being used as evidence of title. *Bushnell v. Harford*, 4 John. Ch. 302. So an injunction was made perpetual, where it appeared that the defendant's mill-dam injured the health of the plaintiffs, although an indictment for the same nuisance was still pending. *Attorney-general v. Hunter*, 1 Dev. Eq. 12. So to prevent a party from shutting up an alley, upon the promise of keeping which open, he has induced a vendee to make a purchase or to pay a higher price for property adjoining upon it. *Trueheart v. Price*, 2 Munf. 468. For other cases where a perpetual injunction will be allowed, see *Armstrong v. Hickman*, 6 Munf. 287; *Willbanks v. Duncan*, 4 Desaus. 536; *Gouverneur v. Titus*, 1 Edw. 477; *Breevort v. McJimsey*, 1 Edw. 561; *Thomas v. Brashear*, 4 Monroe, 68; *Nicoll v. Trustees of Huntington*, 1 John. Ch. 166; *Trustees of Louisville v. Gray*, 1 Litt. 148; *Newburg Turnpike Co. v. Miller*, 5 John. Ch. 111; *Belknap v. Belknap*, 2 John. Ch. 463; *Eden Injunct.* (2nd Am. ed.) 410, et seq. and notes.

(1) See 2 Story Eq. Jur. § 699-707; *Bromley v. Holland*, 5 Sumner's Vesey, 610, note (e), and cases cited.

When made  
perpetual.

In other cases.

To restrain  
waste, or the  
infringement  
of patent,  
or a piracy;  
but case must  
not be doubt-  
ful.

Injunction  
may be grant-  
ed at without  
previous in-  
junction.

The practice of extending injunctions at the hearing so as to render them perpetual, is not confined to cases in which the parties are in a position to annoy the plaintiff, by proceedings which he may have a legal right to institute, but it is applied to prevent a continuation or repetition of acts for which the party has no legal authority whatever; thus, injunctions to restrain waste or the infringement of a patent may be made perpetual at the hearing. So, also, may injunctions to restrain the piracy of a publication (e), or to restrain the use by one tradesman of the trade-marks of another (f).

It is to be observed, that to support a decree for a perpetual injunction, the Court requires that there should be nothing like a doubt in the case (1); and that, in *Whittingham v. Wooler* (g), where the defendant had, in two numbers of a periodical publication of theatrical criticism, inserted detached extracts, to the amount of six or seven pages, from a farce, the property of the plaintiff, containing forty pages, which were interspersed with criticisms, Sir W. Grant, M. R., considered the question, whether the defendant had transgressed the allowed limits of fair extracts, too doubtful to warrant the Court in making a decree for a perpetual injunction, and dismissed the bill with costs (h).

It may be noticed, in this place, that, in order to entitle a plaintiff to a decree for a perpetual injunction at the hearing, it is not absolutely necessary that he should previously have obtained one upon interlocutory application, and that, though he may have failed, upon the answer of the defendant to obtain or support his injunction, he is at liberty to claim it at the hearing (i); and the case will be the same though he may not have made any application for an interlocutory injunction (k).

(e) *Macklin v. Richardson*, Amb. 696; *Seton on Decrees*, 315, S. C.; *Mantey v. Owen*, 4 Burr. 2329, was brought to a hearing, and a perpetual injunction decreed, vide 13 Ves. 502. The case of *Gay's works*, in 1837, is also mentioned as one in which the injunction was made perpetual, 1 Bl. 308. In *Millar v. Taylor*, 4 Burr. 2303, 2417, Mr. Justice Willes remarked that, for sixty years before that time, there had not been more than two or three causes of this description brought to a hearing, the reason which he states to be—that if

the injunction is acquiesced in, it is seldom worth the plaintiff's while to go for the account, ib. 2324. See also *Colburn v. Simms*, 2 Hare, 643; *Kelly v. Hooper*, 1 Y. & C. 197. (f) *Millington v. Fox*, 3 M. & C. 338.

(g) 2 Swanst. 428, n. (h) Vide etiam, *Baily v. Taylor*, 1 R. & M. 73.

(i) Ibid. 76.

(k) *Bacon v. Spottiswoode*, 1 Brev. 384; *Bacon v. Jones*, 4 M. & C. 43, S. C.

(1) A perpetual injunction will not be granted to restrain the defendant from bringing suits for a continued trespass, the right not having been determined at law. *Eldridge v. Hill*, 2 John. Ch. 288.

but the not having moved for an injunction imposes on the plaintiff, in such case, the obligation of making out a clear and exceptionable title at the hearing, and, if he fails in that, and not previously obtained an injunction, he will not be allowed to use the facts proved in the cause as evidence of a *prima facie* case giving him a right to further time, for the purpose of enabling him to establish more satisfactorily his legal title. Upon this principle Lord Langdale, M. R., acted in *Bacon v. Spottiswoode* (l), where he referred to, in which case a patentee brought the cause to the hearing, without having previously moved for an injunction, and the Lordship was of opinion that, on the evidence then produced, an injunction would not have been granted on an interlocutory application, and, upon that ground, refused to retain the bill for the purpose of giving the patentee an opportunity of establishing his title at Law, but dismissed it with costs. The same case afterwards came before Lord Cottenham, upon appeal (m), when his Lordship confirmed the judgment of the Master of the Rolls. In his judgment upon that occasion, the Lord Chancellor observed, "generally speaking, a plaintiff who brings his cause to a hearing is expected to bring it on in such a state as will enable the Court to adjudicate upon it, and not in a state in which the only course open is to suspend any adjudication until the party has had an opportunity of establishing his title by proceedings before another tribunal. And I think the Court would take a very improper course if it were to listen to a plaintiff who comes forward at the hearing and asks to have his title put in a train for investigation without stating any satisfactory reason why he did not make application at an earlier stage. When he comes forward upon an interlocutory motion, the Court puts the parties in the way of investigating their legal title investigated and ascertained, but, when a plaintiff has neglected to avail himself of the opportunity thus afforded, it becomes a mere question of discretion how far the Court will assist him at the hearing, or whether it will then assist him at all. If, indeed, any circumstances had deprived him of that opportunity, in the progress of the cause, the question might have been different; but, in this case, I have not heard any reason suggested why the plain and ordinary course was not taken by the plaintiffs, of previously establishing their rights at Law."

It is to be observed that the principles laid down in the above cases will not, of course, apply to those cases in which the Court grants injunctions at the hearing of the cause, as in the case of *When made perpetual.* But not upon a mere *prima facie* case. When a plaintiff does not apply for an injunction before the hearing. In cases where injunctions can only be granted at the hearing.

(l) 1 Beav. 383.

(m) 4 M. & C. 438.

**Perpetual Injunctions.**

Continuation of injunction must be noticed by decree.

In what cases granted at the hearing.

In bills of peace.

of bills to restrain the setting up of outstanding terms, and others of that description.

It may be mentioned here, that if an injunction has been obtained upon an interlocutory order, and it is intended to continue it at the hearing, care must be taken to introduce a direction to that effect in the decree, otherwise it will not be supported (n).

With respect to the cases in which the Court will decree perpetual injunctions at the hearing of the cause it may be mentioned, that if a decree has been made for the performance of trust, the defendant will be perpetually enjoined from setting up a legal estate in order to overturn it (o). So if a will is established against an heir who suffers the bill to be taken *pro confesso* against him, (as that, in effect, is confessing he has no claim,) and if he permits the decree or order by which he is excluded to be made absolute, (which is, in effect, admitting that if he had any claim he was thereby abandoning it,) the Court will enforce the decree or order until it be duly reversed; and it will grant, for that purpose, a perpetual injunction (p).

Perpetual injunctions will also be decreed where the same question has been frequently litigated in the same manner, or where it is likely to be contested in a multiplicity of suits. This is the foundation for a bill of peace where it is necessary to quiet the rights after repeated ejectments (1): for such a proceeding, unless prevented, would become oppressive to the opposite party (q), or, where there is one general right to be established against a great number of persons, as the right of a parson against his parishioners for tithes, or the right of parishioners against a parson for his modus, or the rights of a lord of the manor against his tenants for encroachments, or the right of the tenants against the lord for disturbance; for, as the difficulties would be insuperable if each of the parties should attempt to determine their particular rights by separate and distinct actions, the Court will put the whole in peace by a perpetual injunction (r).

(n) Seton on Decrees, 300.

(o) Askew v. Poulterers' Comp. 2 Ves. 90; Buckingham v. Buckingham, 2 Eq. Ca. Ab. 527.

(p) Selby v. Selby, 2 Dick. 678.

(q) Leighton v. Leighton, 1 P. Wm. 671; 1 Str. 404; 4 Bro. P. C. 378;

Devonsher v. Newenham, 2 Sch. & Lef. 211; Bath, Earl of, v. Sherwin, 10 Mod. 1; 4 Bro. P. C. 373.

(r) Lord Tenham v. Herbert, 2 Atk. 483; Mayor of York v. Pilkington, 1 Atk. 262; Conyers v. Lord Abergavenny, ib. 265.

(1) 2 Story Eq. Jur. § 852 to 860; Eldridge v. Hill, 2 John. Ch. 281, 283; Alexander v. Pendleton, 8 Cranch, 462, 463; Eden Injunc. (2nd Am. ed.) 416, et seq. and notes.

be observed that an injunction is never made perpetual the hearing of the cause (s); when, however, it is once perpetual, it seems to be so far final, as to remain in force pending the death of the party; for, if it were necessary upon every abatement, that would be, in effect, a perpetual (t). With regard to injunctions which are not perpetual it has been made so by decree, they, also, continue in force pending the suit has abated, and the ordinary course, in law, for the party enjoined, if he wishes to get rid of the injunction, is to move that the plaintiff, or his personal representative revive within a given time, or else that the injunction be dissolved (u).

Effect of Abatement upon.

— never granted on interlocutory application.

#### SECTION V.

##### *the Consequences of a Breach of an Injunction.*

As we proceed to the consideration of the method of vindicating the authority of the Court, in cases where it has been breached by a breach of its injunction, it is necessary that we consider what the effect of an injunction is, and upon what it will be binding.

Effect of the Common Injunction.

As we already seen (x), that in the case of a common injunction, where a declaration has not been delivered, the injunction amounts to a breach of all proceedings whatever; the origin of the rule being, it (1). The Court, in favor of personal liberty, will not permit a writ of Habeas Corpus at Law, while under the imputation of laches for not giving answer, to take the person of his debtor immediately where the declaration has been delivered, the plaintiff at law proceed to trial, the injunction then staying execution.

What acts amount to a breach of it (1).

A distinction arises from the construction which has been given to the following clause, which is always inserted at the end of an injunction which issues in the Court of Chancery — “But never-

Construction of the common injunction.

Rom. 194.  
 v. Townsend, 2 Dick. 3 Beav. 290.  
 1 Ves. 197, sub nom: As- (x) Ante, p. 1818.  
 townshend. (y) Rullen v. Ovey, 16 Ves. 143.  
 s v. Massey, and Turner (z) Harr. ed. Newl. 541; 1 Turn. & V. 362.

What Acts  
amount to a  
Breach of.

*theless, the said defendant is at liberty to call for a plea, and to proceed to trial thereon; and, for want of a plea, to enter up judgment, but execution is hereby stayed.*" It has been contended that, by virtue of this proviso, the delivery of a declaration is ~~no~~ breach of the injunction; and Lord Macclesfield observed, ~~that~~ if it had not been for some resolutions to the contrary, he ~~should~~ have thought so, since, by the very terms of the order, the plaintiff is at liberty to proceed to trial; and the delivery of a declaration, &c. is an incident, without which there can be no trial (b). The construction, however, has always been, that it only applies to a person *in a condition to demand a plea*; and that if the action at Law has not been commenced, or the declaration has not been delivered, when the order for the injunction is made, the plaintiff at Law, notwithstanding these words, is not at liberty to take any step which will enable him to demand a plea (c).

Meaning of the  
words 'for de-  
fault of plea.'

It has also been determined, that the words "*for default of plea*," mean for default of an *issuable plea*; and further, that as the plaintiff may, by the express terms, try an issue on the fact, by the same reason he may try an issue of law. Accordingly, where a defendant at Law had put in a frivolous plea, to which the defendant in Equity demurred, and obtained judgment, it was contended, that this was a breach of the injunction, it being only in one case, viz. — "*for default of plea*" (d), that the defendant might enter up judgment; and here it was said, there was no want of a plea; Lord Macclesfield, however, was clearly of opinion that this was no contempt, since a frivolous plea is as no plea (e).

— to enter.  
up judgment.

The construction also given to the words "*to enter up judgment*," has been, that they apply to a *final judgment*; all that the Court intends to restrain is execution. The plaintiff may, therefore, proceed so far as to place himself in a situation in which he may be able to take out execution the instant that the injunction is dissolved; consequently, after an interlocutory judgment, *as by default or on demurrer*, the plaintiff at Law may go on to ascertain his damages (f). Where the defendant in Equity had brought an action against the plaintiff, as executor, and on *plene administravit* pleaded, took judgment *de bonis testatoris cum acciderint*, and afterwards took out a *scire facias*, in order to inquire

Does not pre-  
vent a *scire*  
*facias* to in-  
quire after  
assets.

(b) 3 P. Wms. 147, n.

(c) Sidney v. Hetherington, 3 P. Wms. 147, n.; Bullen v. Ovey, 16 Ves. 141; Mills v. Cobby, 1 Mer. 3; Eden on Inj. 69.

(d) Morrice v. Hankey, 3 P. Wms. 146.

(e) Sidney v. Hetherington, *ubi supra*; Eden, 70.

(f) 3 P. Wms. 147.

sets; it was said, that the *scire facias* was in the nature of a return after judgment; and that this was a breach of the injunction, being a proceeding after judgment; Lord King, however, said it was no breach, being only a continuation of the old writ on the same record, and in the nature of a proceeding after interlocutory judgment to a final one (*g*). And where an injunction having been obtained to restrain the defendant from proceeding on an award for payment of money, which had been made by the Court of Queen's Bench, the defendant applied to the Court for an attachment for nonperformance of the award, and obtained a rule to show cause; Lord Roslyn was of opinion, that it was an analogy to the practice, which, where an action has been commenced, permits a party to go on to trial and judgment only stays execution; the making the award a rule of which had been done before the injunction, was to be regarded as the commencement of the proceeding; and that the defendant might not only obtain a rule to show cause, but might have gone on to make his rule absolute, without being guilty of a breach of the injunction, provided he did not execute the rule (*h*). It is scarcely necessary to cite a case to show that it is not a breach to show cause against a rule for a new trial; but where an injunction had been obtained to restrain the defendant from taking possession under a verdict which he obtained in ejectment and previous to the issuing the injunction, the costs of the action had been taxed, and a writ of possession executed; the plaintiff at Law having afterwards procured judgment for nonpayment of the costs taxed, was considered, by Lord Eldon, as guilty of a breach of the injunction (*k*).

What Acts amount to a Breach of.

When injunction is to restrain proceedings before award.

Showing cause against a rule for a new trial.

Suing out an attachment for nonpayment of costs.

Where an injunction had been obtained by an obligor in a recognizance bond upon a bill to which the co-obligor was not a party, execution was afterwards taken out upon a joint judgment; the obligee gave notice to the Sheriff of the injunction, and required him not to take the plaintiff in Equity; upon the question whether this was a breach of the injunction, Lord Eldon observed, that in the motion was first made, he thought it a breach; that if of execution given to the Sheriff, without any instructions, and in his receipt of it, a command of the law to take the defendant, and whether the Sheriff did or did not take him, it would not be a breach; if, however, a direction was given to the Sheriff,

When the sheriff has notice not to take the plaintiff in Equity.

1. *Morrice v. Hankey*, 146. (k) *Partington v. Booth*, 3 Mer. 148.  
2. *Morice v. Franco*, 2 Cox, 420.  
3. *Attmore v. Thornton*, 3 Pri.



What Acts  
amount to a  
Breach of.

not to proceed against the person of that defendant, with notice of the injunction restraining any proceedings against him; that defendant was named in the writ *pro forma* and *ex necessitate*; and it was in substance a proceeding against the other defendant only and not a breach of the injunction (l).

Proceeding  
against bail is  
a breach of in-  
junction.

It is now clearly settled, that if an injunction is obtained by a defendant at Law who has given bail, a proceeding against the bail is a breach of the injunction, although he is no party to the suit (m). Formerly the course was different, and the bail were obliged to file a bill themselves; "but," to use the words of Lord Eldon, "we are now got into a much worse practice." The alteration began with Lord Thurlow, and so it has been continued till the present time, on the ground that a proceeding at Law against a bail is to be treated as a proceeding against the party (n).

Proceedings  
against co-  
obligor.  
or sureties no  
breach of  
injunction.

But the principle will not be extended to the surety, or the co-obligor in a bond who is not a party to the suit; for there is no instance where it was ever held, that if one obligor file his bill for an injunction, without making the other either a co-plaintiff or a defendant: a proceeding at Law against that obligor was considered a breach of the injunction on the mere policy that, if one obligor pays by compulsion, the other will have to indemnify him or finally to contribute to the debt (o).

Proceedings  
against sheriff.

The rule, however, is acted upon with regard to proceedings against the Sheriff: and the taking out a rule for the Sheriff to bring in the body, when an injunction has been obtained in Equity to restrain the plaintiff from proceeding with his action (p), or the suing out a writ to compel the Sheriff to make a proclamation for the outlawry of the plaintiff (q), or the calling on the Sheriff to pay the money, is a breach of the injunction. *Bolt v. Sturges* (r), is a strong illustration of the rule;—in that case the defendant had taken out execution and the Sheriff had levied before the injunction issued; the Sheriff refused to pay over the money levied, and the defendant commenced an action against him for money paid and received to his use. An attachment was issued against the defendant, for this proceeding; upon a motion to set aside which, it was argued that the plaintiff was not a party to the suit; that the bill did not pray an injunction against him; and

(l) *Chaplin v. Cooper*, 1 V. & B. 16.

(m) *Stone v. Tuffin*, Ambl. 32; *Franklyn v. Thomas*, 3 Mer. 234.

(n) *Leonard v. Attwell*, 17 Ves. 385.

(o) *Chaplin v. Cooper*, 1 V. & B. 16.

(p) *Bullen v. Ovey*, 16 Ves. 14 V.

(q) *Marsack v. Baily*, 2 S. & S. 577. See also *Woodley v. Boddington*, 9 Sim. 214.

(r) 2 Anst. 556.

he Sheriff had levied, he was bound immediately to pay the Court, however, said, that though the words of the injunction were only against proceeding in the action at Law against the Sheriff, yet the clear meaning of it was to prevent the defendant having any benefit of that suit as long as the injunction was in force. If the proper mode of compelling the Sheriff to pay money levied, had been pursued,—that is, if a rule had been obtained against him, it would clearly have constituted a breach of the injunction, and therefore the circuitous and improper mode of suing the Sheriff in a fresh action could not give the plaintiff a better claim. The writ under which he levied, and the return made to it, are parts of the suit; and any mode of compelling the Sheriff to make such return, or to complete the return, seem, in sense, a proceeding in the action within the scope of the injunction. It is to be observed that, in *Iveson v. Ives* (1), Lord Eldon appears to have doubted the correctness of the rule, on the ground, that the Court is not competent to hold a Sheriff bound by an injunction who is not a party to the cause for the purpose of the cause: the old rule being, that it was necessary to bring a person into Court, so as, according to the ancient laws of this country, to be made a subject of the writ: but, subsequently held the contrary, in *Leonard v. Attwell* (2), and the principle may be considered to be finally settled as stated.

### What Acts amount to a Breach of.

tion to restrain proceedings at Law, is directed to the party, his *Counsellors, Attornies, Solicitors, and Agents (u)*, To whom the writ is directed. special injunction to restrain waste, &c., is usually directed to the party, *his servants, workmen, and agents (x)*; consequently, his *Counsellors, Attornies, &c.*, of the party, in the first case; his *servants, workmen, or agents* in the second, having had notice of the injunction, do any thing inhibited by it, they will be liable to contempt (y).

**To whom the writ is directed.**

respect to what will be considered as a breach of a special  
m, that must depend entirely upon the form of the injunc-  
the nature of the act to be prohibited (z) (1).

**What will amount to a breach of a special injunction.**

es. 251, 256.

(x) Ante, p. 1894.

Ves. 385; et vide etiam,  
Guffin, Amb. 32; Franklyn  
1, 3 Mer. 234.  
te, p. 1817.

(y) Vide *Lewes v. Morgan*, 5 Pri.

(z) See *St. John's College v. Car-*  
*r*, 4 M. & C. 497.

**Lansing v. Easton, 7 Paige, 364; M'Credie v. Senior, 4 Paige,**

It can be deemed a breach of an injunction forbidding the disturbance of way which does not interfere with its free exercise. *Bosquehanna Canal*, 3 Bland, 63.

What Acts  
amount to a  
Breach of.

Irregular in-  
junctions  
must be  
obeyed ;

No breach of  
injunction  
without no-  
tice of it,

but actual ser-  
vice not neces-  
sary.

Committal will  
be ordered  
wherever the  
party has had  
notice,

It has been already stated, that an injunction operates from the date of the order, and not from the sealing of the writ (a) ; and it is to be observed, that although an injunction be irregularly obtained, it is still an order of the Court and must be discharged before it can be disobeyed. Where, however, the defendant and his solicitors had been guilty of a breach of an injunction which was irregular, Lord Eldon refused to commit them, but ordered them to pay the costs occasioned by the breach of injunction and of the motion to commit (b) (1).

Before the Court will punish for a breach of an injunction, it must be clear that the party knew that the injunction had been issued (2) ; strictly speaking, he ought to be served with the writ itself, under the seal of the Court, in the manner already pointed out, but circumstances will justify a committal without the actual service of the writ, as where the matter is pressing and there is not time to procure the writ ; or where the order is made in vacation, when the offices are closed : in such cases, as we have already seen (c), the service of the writ will be dispensed with, and service of a copy of the minutes of the order, or of a notice of their having been passed, will be sufficient.

In some cases, a committal may be ordered, where neither the writ nor the minutes of the order have been served, nor any personal notice given ; thus it was held, by Lord Hardwicke, that if the person was in Court at the time the order for an injunction was pronounced, that alone would be sufficient notice (d) ; and if the party should remain in Court, until the order was about to be made, he cannot, by getting out of the Hall at that instant, avoid its consequences (e). So also, if he is informed that the injunction has been granted, and there has been no delay on the part of the plaintiff in endeavoring to get the order drawn up, the defendant will be committed for the breach of it ; because it

(a) Ante, p. 1817.

(b) Partington v. Booth, 3 Mer. 148.

(c) Ante, p. 1817.

(d) Anon. 3 Atk. 567 ; Skip v.

Harwood, ib. 564.

(e) Osborn v. Tennant, 14 Ves. 136.

(1) Where an injunction is in operation, a party should respect it, although improperly issued. *Moat v. Holbein*, 2 Edw. 188.

The Court will take into consideration the fact, that the injunction was erroneously granted, and without sufficient equity to sustain it, in determining the extent of the punishment to be imposed upon the party who has been guilty of a breach of it. *Sullivan v. Judah*, 4 Paige, 444.

(2) On affidavits of a breach of an injunction to stay waste and of personal service of a copy of the affidavits, and notice of the motion, an attachment was ordered to bring up the defendant to answer for the contempt. *Schoonmaker v. Gillet*, 3 John. Ch. 311. See *Rutherford v. Metcalf*, 5 Hayw. 60.

ld be a contempt to act contrary to such an order, when he  
w the order was made (*f*). In these and the like cases all  
mischief might be done, and the Court might as well grant no  
action at all, unless this kind of notice was to be held suffi-  
t before the great seal was actually applied to the writ. In the  
nee of an injunction against committing waste, the party in  
nterval might lay the axe to the trees; or if it was against  
ying a ward of Court, the marriage might be had next morn-  
y a license fraudulently obtained.

Committal to  
the Fleet.

short, the Court will not, under such circumstances, permit  
in to elude its justice by doing that before the injunction is  
ed, which, if it was actually sealed, would be a contempt. But  
plaintiff must not be guilty of any unnecessary delay either in  
ng the order drawn up, or in serving it when obtained; for  
gh the Court will prevent his losing the benefit of the process,  
he is actually pursuing it, yet it cannot consider him as en-  
l to that order for three or four months together (*g*).

but plaintiff  
must not be  
guilty of  
laches.

here a party has been guilty of a contempt by the breach of  
junction, the proper course of proceeding, if he be not a Peer  
herwise entitled to privilege of Parliament, is to obtain an  
r for his committal (*h*) (1).

Order for, how  
obtained;

is order must be obtained upon motion, of which notice must  
been duly served upon him *personally*. And it is to be ob-  
d that the terms of the notice of motion should be that the  
"may stand committed" to the Queen's Prison, for breach  
e injunction, and not "that he may show cause why he should  
e committed" (*i*). The plaintiff, however, may, as it seems,  
an order *ex parte* that the defendant may stand committed  
certain day unless he shows cause against it, which order

upon motion  
with notice.

) *Kimpton v. Eve*, 2 V. & B.  
*Vassandau v. Rose*, 2 J. & W.

*James v. Downes*, 18 Ves. 523.  
*Angerstein v. Hunt*, 6 Ves. 488.  
practice formerly was, that, up-  
davit of service of the injunc-  
a attachment would issue for  
each of it. If the defendant  
rrested upon the attachment,  
stered his appearance with the  
rar, interrogatories were filed  
hibited against him, to which

he must answer upon oath. If he  
denied the service, the other party  
might examine witnesses to prove it,  
and, if proved, the Court made him  
pay all costs and charges before he  
could be discharged. Harr. ed. Newl.  
551.

(2) *Ibid.* 552. When the injunc-  
tion is that he may do a particular  
thing, the order is, that he may do it  
by a particular day; or stand commit-  
ted; *Durant v. Moore*, 2 R. & M.  
38.

No motion made after the dissolution of an injunction for an attach-  
on the ground of an infringement of it while in force, can be sustain-  
*Meat v. Holbein*, 2 Edw. 188.

Committal to the Queen's Prison.  
 by order nisi. must be *personally* served upon the party to be committed. But whether it be the order *nisi*, or a notice of a motion for an absolute committal, the service must be personal, unless where the defendant has absconded: in which case, an order may be obtained for service on his solicitor, or at his last place of abode shall be deemed good service; and, upon that service, under such circumstances, he may and will be committed (*k*).

Affidavit of service. An affidavit of the personal service of the notice of motion, or of the order *nisi*, should of course be prepared and filed, and on the day named in the notice, the motion should be made by the Counsel for the plaintiff, for the commitment; but, if an order *nisi* has been obtained and served, the application should be that it may be made absolute.

Production of the writ in Court, not necessary. In *Ellerton v. Thirsk* (*l*), Lord Eldon is reported to have said that a motion to commit for breach of an injunction could not be made without producing the writ; but, in a recent case (*m*), Lord Cottenham held, that if a party having notice of an injunction is guilty of a breach of it, he may be committed without the production of the writ. His Lordship, upon that occasion, observed, "he did not think that Lord Eldon could ever have laid down such a rule as that in *Ellerton v. Thirsk*," — the writ bears date when the order is passed. If, therefore, the proposition were correct, a party would have all the interval between the making and the passing of the order, to commit the act which the injunction is intended to restrain.

Where party had notice of it.

*Secus* where writ has been served and issued.

It is to be observed, however, that the decision of Lord Cottenham applies only to cases in which it may be necessary to apply to the Court to punish for a breach of the injunction committed before the injunction has been issued, and not to cases in which the application is made after the injunction has been issued and served (*n*).

If, when the motion is brought on, the other side is not prepared to resist it, the Court usually gives him a day to show cause against it; and then, upon hearing the affidavits, the Court decides whether the party is guilty of the breach of the injunction or not, and if he be guilty, makes an order for his commitment.

(*k*) *Sir W. Pulteney v. Shelton*, 5 Ves. 147; *Pearce v. Crutchfield*, 14 Ves. 206.

(*l*) 1 J. & W. 376.

(*m*) *M'Neil v. Garratt*, 1 Craig & Phillips, 108.

(*n*) In a recent case, where the

writ had been actually issued and served, the question whether it was necessary that it should be in Court upon a motion for a committal, was discussed before Lord Langdale, M. R. who, however, did not decide the point.

The effect of a committal for a breach of injunction is usually that of retaining the offender in prison until he submits by paying the adverse party his costs (*o*) (1). Committal to the Queen's Prison.

It is to be observed, however, that, if the breach of injunction is the result rather of an error in judgment than of a wilful contempt, the Court will not direct a commitment, but will merely order the party to pay costs incurred by the breach of the injunction and by the application (*p*) (2). Effect of committal.  
In what cases not ordered.

The plaintiff may, also, by his acquiescence in the breach, disagree with the ordinary process; though, strictly speaking, no act of the parties can amount to a waiver of a contempt of the Court (*q*). Where there has been acquiescence by plaintiff.

Peers and others entitled to privilege of peerage, and Members of the House of Commons, are not liable to be committed for a breach of an injunction, but the Court will order a sequestration sue (*r*).

The same course of proceeding may be adopted in the case of corporations aggregate. — of corporations.

As has already been observed, that, although an injunction be regular, a party, acting in contravention of it, will be guilty of a contempt (*s*). The proper course, where there is an irregularity in the injunction, is to apply to discharge it (*t*). How discharged for irregularity.

For this purpose the party may, by motion of course, obtain an order to refer it to a Master; and then, if the Master reports it to have been irregularly issued, and no exceptions are filed, the Court, on the Master's report, will dissolve the injunction (*u*). By reference to a Master.

Harr. ed. Newl. 552. 2 Dick. 703; Marquis of Downshire v. Lady Sandys, ubi supra.  
(*o*) Partington v. Booth, 3 Mer. v. Lady Sandys, ubi supra.  
vide etiam, the Marquis of (s) Ante, p. 1907; et vide Marq. of Downshire v. Sandys, 3 Mer. 107.  
Sandys v. Lady Sandys, 6 Ves. (t) Robinson v. Lord Byron, ubi supra; Partington v. Booth, 3 Mer. 149.  
Mills v. Cobby, 1 Mer. 3. Vid Robinson v. Lord Byron, 149.  
(u) Harr. 552.

Where there has been an actual breach of an injunction, the statute of York gives the Court no discretion, but requires the infliction of a fine sufficient to indemnify the plaintiff for the injury sustained by such breach, and the costs and expenses. And the defendant cannot, in such a case, be discharged from imprisonment, without the consent of the prosecutor, until the fine is actually paid. *Lansing v. Easton*, 7 Paige, 364.

The fact that the defendant, in violating the injunction, acted under the advice of counsel, will not protect him from a fine sufficient to ensue the adverse party for the injury sustained; although such advice may protect him from further punishment. *Ib.*; *Hawley v. Bennet*, 4 Paige, 163.

Committal to  
the Queen's  
Prison.

By motion.

But although the above method of obtaining the opinion of Court upon the regularity of an injunction may be resorted to where convenient, the more usual course is, to move at once upon notice, that the injunction may be discharged for irregularity (1).

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(1) *Read v. Davis*, R. M. Charl. 358.

## CHAPTER XXXVI.

### AND ORDERS IN THE NATURE OF INJUNCTIONS.

#### SECTION I. — *Restraining Orders under st. 5 Vic. c. 5.*

In the last chapter having been devoted to the consideration of Restraining Orders under its of injunction as the Court of Chancery issues under its 5 Vict. c. 5. and inherent jurisdiction, — we shall now proceed in this sec. 4. to investigate the practice concerning certain orders and a similar effect issued under a jurisdiction conferred by Parliament. These are, first, an order restraining the of stock or shares under stat. 5 Vic. c. 5, sec 4.

Secondly, the writ of distringas, which the Court of Chancery Writ of distringas. is authorized to issue by the 5th section of the same Act.

It also be convenient to include in this chapter a statement Stop orders. of practice concerning stop orders which are not made under Parliament; indeed, as they apply to funds over which the as previous control, they only derive their authority from orders in the causes to which the funds affected by them

As we have before seen (a), that by st. 40 Geo. III. c. 36, Courts Bank of Eng- ty are enabled to make orders either directing the transfer land need not be made a par- ty, or restraining the Bank of England from suffering a ty under st. 40 although the Governors and Company of the Bank are not Geo. III. c. 36. to the cause in which the order is made. This statute, in uses, prevents the necessity of making the Bank a party to where part of the relief sought by the bill is to obtain a of stock, or to prevent a defendant from obtaining such a contrary to the rights of the plaintiff.

The object of this statute, however, is only in certain circum- to prevent the necessity of making the Bank a party to a

As it does not provide any summary means of preventing a trans- Effect of the statute. does it, when a cause has been regularly instituted, enable ntiff to apply for an injunction against the Bank otherwise



Limited effect  
of st. 40 Geo.  
III. 1766.

than upon notice to the defendant, or in a case of emergency upon such affidavits as would be sufficient to enable the plaintiff to obtain a special injunction against the defendant (b).

The privilege of obtaining orders directing or restraining the transfer of stock without making the corporation a party to the suit, applied only to government stock and the Bank of England. It did not extend to shares and interests in other public companies, whether incorporated or not. Moreover it was found that, even with respect to government stock, neither the remedy given by the above-mentioned Act, nor that afforded by the old writ of *distingas* issued out of the Court of Exchequer, was sufficient to prevent injuries arising from the facility with which stock was transferred from one person to another. For these reasons, by the 4th section

Effect of 5 Vic.  
c. 5, sec. 4, by  
which restraining  
order is  
created.

of 5 Vic. it is enacted, "That on and after the fifteenth day of October, 1841, it shall be lawful for the Court of Chancery upon the application of any party interested by motion or petition in a summary way without bill filed to restrain the Governor and Company of the Bank of England, or any other public company, whether incorporated or not, from permitting the transfer of any stock in the public funds or any stock or shares in any public company which may be standing in the name or names of any person or persons or body politic or corporate in the books of the Governor and Company of the Bank of England, or in the books of any such public company, or from paying any dividend or dividends due or to become due thereon, and every order of the said Court of Chancery upon such motion or petition as aforesaid, shall specify the amount of the stock or the particular shares to be affected thereby, and the name or names of the person or persons body politic or corporate in which the same shall be standing, provided always that the said Court of Chancery shall have full power upon the application of any party interested to discharge or vary such order, and to award such costs upon such application as to the said Court shall seem fit."

Order how  
obtained.

Under this section, a party is now enabled, without a suit being instituted, or a bill being filed by motion or petition in a summary manner, to obtain an order restraining the transfer of stock in any public company. Upon an application of this nature, it is clear that the Court must be satisfied by affidavit that there is a necessity for such an intervention. There have not, however, as yet been many cases to determine what evidence will be deemed sufficient.

(b) *Maundrell v. Maundrell*, 6 Ves. 773, n ; *Doolittle v. Walton*, 2 Dick. 442.

case of *ex parte* Field (c), Sir J. L. Knight Bruce, V. C., to make such an order upon an affidavit of the petitioner, to the effect that the deponent had been informed and that it was the intention of the trustee to sell out the stock in the country.

Effect of the  
restraining  
Order.

Effect of the  
order.

Effect of such an order, when obtained, seems to be the effect of an *injunction*, and it continues in force until dissolved by order of Court. But as the Act does not confer upon the Court of Chancery any new and summary jurisdiction to adjudicate upon disputed rights without a bill filed, it appears that such an order is intended only for interim purposes, and that it will be dissolved if a bill be not filed within what the Court shall think reasonable time after it is obtained (d).

Following case has occurred upon this section of the Act :  
2nd June, 1842, the Marquis of Hertford, as residuary executor of his late father, obtained an order *ex parte* from Sir J. Knight Bruce, V. C., to restrain the transfer of a sum of 4000*l.* new cent. annuities, then standing in the name of Nicholas Hare, who had been valet to the late Marquis, and against whom an indictment was then pending for the embezzlement of the stock which the stock had been purchased. On the 1st July 1842, Hare was discharged by the Vice-Chancellor with costs (e). The Marquis, however, having appealed from that decision to the Lord Chancellor, the execution of the order of the 1st July was, by agreement between the parties, suspended until the appeal should be heard. In the mean time, the indictment against Hare was acquitted, and on the 12th July, being a few days after the acquittal, the Marquis filed a bill against Hare, the executor of his late father, and Company of the Bank of England, and executors of the late Marquis, alleging that the stock had been purchased by Hare with the produce of certain cheques which he had received from the late Marquis for the purpose of paying bills, praying that Hare might be declared a trustee of the stock for the plaintiff, and that an injunction might be granted to restrain the transfer of the stock. On the 13th July, the appeal motion came on before the Lord Chancellor, when an order was made by consent continuing the original order as to 1500*l.*, part of the stock (f).  
An order was subsequently made on behalf of the defendant. Hare had answered the bill to discharge the order of the 13th

& C. 2, and see in re Marquis of Hertford; 1 Hare, 584, for an order which was considered sufficient.

(d) In re Marquis of Hertford, 1 Hare, 584.

(e) In re Marquis of Hertford, 1 Hare, 584.

(f) 1 Ph. 129.

Effect of the  
restraining  
Order.

of July, which was not, (upon the suggestion of the Lord Chancellor) by a motion on behalf of the plaintiff, to continue the order, as in the alternative to grant an injunction in the cause. Whereupon, Lord Lyndhurst, V. C., after stating the facts, said, "The present application is to discharge the restraining order made to the 1500*l.* and affidavits have been filed in support of, and in opposition to, the motion. Some objection was made to the reading of these affidavits; and it was contended, on the part of the defendant, that the question must be decided by the answer. I think there is no foundation for the objection. When a restraining order has been issued, this Court has, by the terms of the Act, full power upon the application of any parties interested, to discharge or vary it, and the Court will be guided in the exercise of the discretion with which it is intrusted, not merely by the statements contained in the answer, but also by the affidavits filed, as well in opposition to the answer as in support of it."

His Lordship then went into the merits of the case, and concluded by saying that he did not feel himself justified in discharging the restraining order, and he did not think it necessary to make any order upon the motion of the plaintiff to continue the restraining order, or, in the alternative, to grant an injunction in the cause (*g*).

Affidavits may  
be read in  
support of the  
restraining  
order con-  
tradicting the  
answer.

It appears from this case that in one respect a restraining order granted under the Act of Parliament is a more efficient security than an injunction obtained in a cause; namely, that affidavits may be read to prove that the restraining order ought to be continued although they are contradictory to an answer filed by the person, saying the transfer of whose fund is restrained. Whereas, in an injunction cause, the plaintiff is usually precluded from reading, upon a motion to discharge the injunction, affidavits filed in opposition to the defendant's answer. The reason of this distinction seems to be that the restraining order is obtained upon petition or motion independent of the suit, and therefore, upon any motion concerning it, the answer has not the same weight which is attributed to it upon an interlocutory application in the cause in which it is filed.

Form of the  
petition.

The petition for an order of this description should be intitled in the Act of Parliament, and also in the name of the person on whose behalf it is presented. It should state the circumstances on which the petitioner relies to induce the Court to grant the required order.

In the Marquis of Hertford's case, the petition prayed that a writ of injunction might issue. And the order made upon the petition was, "That an injunction be awarded to restrain the Governor and Company of the Bank of England from transferring the sum of 4000*l.* Bank annuities standing in their books in the name of Nicholas Suisse, until the further order of the Court, the party applying undertaking to serve the said Nicholas Suisse with notice of the injunction within twenty-four hours from the date hereof." From this case, it might be inferred that the practice would be under this section of the Act to issue a writ of injunction under seal; but upon reference to the terms of the Act, it seems that it would be more correct, instead of a writ being issued, for the Court merely to make an order specifying the amount of the stock or the particular shares to be affected, and restraining the Bank of England or the public Company in the names of which the stock or shares are standing from transferring the same.

Effect of the restraining Order.  
Order upon it.

Whether a writ of injunction should be issued under seal.

In a recent case before the V. C. of England, no writ was issued, but an order was drawn up in the following form:—"This Court doth order that the London Dock Company be restrained by the order and injunction of this Court from transferring, or permitting or causing to be transferred, the sum of 750*l.* stock standing in the books of the London Dock Company, in the name of A. B., mentioned in the affidavit of C. D. (*the petitioner*), or any part thereof, without notice to the said C. D., or until the further order of this Court."

Form of the order.

It will be observed, that in this case the petitioner was not put upon terms to give notice to the party whose fund was sought to be affected, in the same manner as was done in the Marquis of Hertford's case.


Whether the petitioner should be put upon terms of giving notice.

As we have before seen (*h*) that the writ of execution is now abolished, there does not seem to be any very material difference in the manner in which the restraining order will be enforced in consequence of its not being under seal. It is presumed that after service of the order itself, ordinary process of contempt will sue.

Manner in which order enforced.

(*h*) Ante, p. 1249.

How writs of  
Distringas ob-  
tained.



## SECTION II.

*The Writ of Distringas.*

Formerly is-  
sued from the  
Exchequer.

5 Vic. c. 5, sec.  
5, authorizing  
the writ of dis-  
tringas.

How the writ  
obtained.

Affidavit.

HAVING now stated the practice with respect to the restraining order authorized by the 4th section of the 5th Vic. c. 5, the next subject of investigation is the writ of distringas. This remedy is not one of recent adoption : Previously to the passing of the above-mentioned Act, where a transfer of stock, or payment of dividends, was sought to be immediately restrained, the mode of proceeding was to obtain a distringas from the Court of Exchequer against the Bank, and to serve it upon the secretary of the Bank of England, accompanied by a notice that the object of the distringas was to prevent the transfer of the stock, or payment of the dividends as described in the notice. The statute 5 Vic. c. 5, which abolished the equitable jurisdiction of the Court of Exchequer, has conferred upon the Court of Chancery the power to issue the same writ, for, by section 5, it is enacted, "That in the place and stead of the writ of distringas, as the same has been heretofore issued from the said Court of Exchequer, a writ of distringas in the form set out in the first schedule to the Act shall, on and after the said fifteenth day of October, 1841, be issuable from the Court of Chancery, and shall be sealed at the Subpena Office ; and that the force and effect of such writ, and the practice under or relating to the same shall be such as is now in force in the said Court of Exchequer."

In order to obtain a writ of this description, all that is necessary is that the person applying for it, or his solicitor, should be able to make an affidavit in the following form, which is prescribed by the 2nd Order of November, 1841 : —

A. B. (*the name of the party in whose behalf the writ is sued out*), v. the Governor and Company of the Bank of England.  
I, \_\_\_\_\_ of \_\_\_\_\_ do solemnly swear that, according to the best of my knowledge, information, and belief, I am (*or, if the affidavit is made by the solicitor, A. B. of \_\_\_\_\_ is*) beneficially interested in the stock hereinafter particularly described, that is to say (*here specify the amount of the stock to be affected by the writ, and the name or names of the person or persons or body politic or corporate in whose name or names the same shall be standing.*)

The writ itself is prepared by the solicitor of the applicant in the form prescribed by the Act of Parliament, as follows : —

VICTORIA, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, to the Sheriffs of London, greeting. We command you that you omit not by reason of any liberty, but that you enter the same and distrain the Governor and Company of the Bank of England by all their lands and chattels in your bailiwick, so that they, or any of them, do not intermeddle therewith until we otherwise command you : and that you answer us in the issues of the said lands so that they do appear before us our High Court of Chancery on the \_\_\_\_\_ to answer a certain bill of complaint lately exhibited against them and other defendants, before us in our said Court of Chancery by \_\_\_\_\_ complainant; and further to do and receive what our said Court shall then and there order in the premises, and that you then leave them this writ.

How sealed  
and issued.  
Form of the  
writ.

Witness ourself at Westminster this \_\_\_\_\_ day of \_\_\_\_\_ in the \_\_\_\_\_ year of our reign.

DEVON.

The writ and affidavit having been prepared in the manner above stated, the next step is to have the writ duly sealed. For this purpose the 1st Order of the 17th of November, 1841, directs, "That any person or persons claiming to be interested in any stock transferable at the Bank of England, standing in the name or names of any other person or persons or body politic or corporate in the books of the Governor and Company of the Bank of England, may, by his or their solicitor, prepare a writ of distringas pursuant to the said Act in the form set out in the first schedule to the said Act, and may present the same for sealing at the Subpœna Office."

By whom prepared.

And by the 2nd of the same Orders it is directed, "That upon the presentment of such writ for sealing, and on leaving with the patentee of the Subpœna Office an affidavit duly sworn by the person or one of the persons applying for such writ or his solicitor, before one of the Masters, or Masters extraordinary of this Court, in the form set out at the foot of those Orders, the same writ shall (in conformity with the Orders of this Court for issuing and sealing writs of *subpœna*) be forthwith sealed with the seal of the Subpœna Office; and such writ, when sealed, shall have the same force and validity as the writ of distringas heretofore issued out of the Court of Exchequer."

How sealed.

The next subject of consideration is the effect of such a writ after it is obtained: it will be recollected that the Act directs, that "The force and effect of such writ, and the practice under or relating to the same, shall be such as is now in force in the Court of Exchequer;" subject, however, to order, thereafter to be made in

Effect of the writ.

Effect of the  
Writ of Dis-  
tringas.

Chancery, upon the subject. The effect of the writ in the Court of Exchequer was thus stated by Lord Lyndhurst in *ex parte Amyot* (i). "The writ of *distringas* was granted under the old practice, and this afforded an opportunity of instituting a suit for relief, the property being secured in the mean time. The practice was for the Bank, upon an application being made for a transfer, to give notice of it to the party who had obtained the writ; and unless a bill was filed, and an injunction obtained within a limited time, the benefit of the *distringas* was withdrawn."

Under orders  
in Chancery.

The Orders in Chancery upon the subject do not seem to have materially varied this practice of the Court of Exchequer. By the 3rd Order of 17th November, 1841, "Such writ of *distringas*, and all process thereunder, may at any time be discharged by the order of this Court, to be obtained as of course, upon the petition of the party on whose behalf the writ was issued, and to be obtained upon the application by motion or notice, or by petition duly moved of any other person claiming to be interested in the stock sought to be affected by such writ, and that upon or after such application, such costs thereof and in relation thereto, and to the said writ, as to this Court shall seem just, may, if this Court shall think fit, be awarded and ordered to be paid by the person or persons who obtained such *distringas*, or upon an application by any other person or persons by such person or persons."

How long the  
writ operates  
after notice.

By the 4th Order, "The Governor and Company of the Bank of England, having been served with such writ of *distringas*, and a notice not to permit the transfer of the stock in such notice, and in the said affidavit specified, or not to pay the dividends thereon; and having afterwards received a request from the party or parties in whose name or names such stock shall be standing, or some person on his or their behalf, or representing him or them, to allow such transfer, or to pay such dividends, shall not, by force or in consequence of such *distringas*, be authorized without the Order of this Court to refuse to permit such transfer to be made, or to withhold payment of such dividends for more than eight days after the date of such request."

It remains now only to be stated, that the fact of a person having sued out the writ of *distringas*, does not preclude him from subsequently presenting a petition for a restraining order under the fourth section of the Act (k). Indeed, as we have seen, the effect of the writ of *distringas* is only temporary; if the person who obtains it wishes to continue the restraint upon the transfer,

(i) 1 Ph. 139, (n).

(k) 1 Ph. 132.

must either obtain a restraining order under the fourth section, by filing a bill against the party interested in the fund, obtain regular injunction against the Bank under the st. 40 Geo. III. 36.

Costs.

By the 5th Order of the same Orders, it is directed, "That upon giving such affidavit as aforesaid, with the patentee of the Subpoena Office, there shall be paid to such patentee the sum of one shilling for filing such affidavit, and that within twenty-four hours from the time when such affidavit shall be so left, the said patentee shall pay the said sum of one shilling to the Clerk of the Affidavits, and cause such affidavit to be filed and registered at the office of such Clerk."

Costs.

By the 5th Order, upon the sealing of such writ of distringas the sum of five shillings and sixpence shall be paid to the patentee of the Subpoena Office, and that out of such sum the said patentee shall pay the sum of four shillings to the Accountant-general, to be by him placed to the credit of the account, entitled "the Suits' Fee Fund Account."

The 7th Order directs, that "For and in respect of the preparation and service of such writ of distringas, and the *præcipe* and attendance in respect thereof, such costs shall be allowed as by the rules and practice of this Court are allowed for the preparation and service and attendance in respect of a writ of subpoena to answer a bill."

### SECTION III.

#### *Stop Orders.*

THE writs and orders hitherto considered in this Chapter apply to government stocks and shares in public companies, but they do not extend to funds in Court standing in the name of the Accountant-general.

With respect to funds of this description, whether they are standing to the general credit of a cause, or whether they have been carried over to any particular account, the Court, in its own jurisdiction, without any statutory authority, has always exercised the power of issuing what are called Stop Orders. Any person, though not a party to the Cause in which the fund is standing, who has become interested in, or entitled to any such fund, or to any share thereof, may apply by petition to that Court to which the cause is attached, for an order preventing the payment of the fund in question without notice to the applicant.

To what funds they apply.

Who entitled to stop orders.



Service of the  
Petition.

What the peti-  
tion must  
state.

What evi-  
dence requi-  
site.

On whom peti-  
tion must be  
served.

The petition for this purpose must show generally the title of the assignor, although it is not absolutely necessary that it should show the particular share of the fund to which he was entitled.

Secondly, it must show the assignment to the petitioner (2). These facts should not only be stated in the petition, but the Court must have proof that they are truly stated. The former, namely, the title of the assignor, will usually appear from the proceedings and records in the cause; where this is not the case, it must be established by affidavit (m). The latter, namely, the assignment to the petitioner, is generally proved by the assignor either joining in the petition, or appearing and admitting it; when this is not the case, the assignment must be proved in the regular way (n). To obviate the expense of strictly proving the deed, it is not unusual for the assignment to give the assignee power to use the name of the assignor as a co-petitioner.

It was formerly necessary, upon applications for stop orders, that the petitioner should give notice to all the persons interested in the fund; for as there was no provision enabling the Court to make the person applying pay the costs consequent upon the order, it was considered unjust that a person should obtain an order affecting another party's fund in his absence (o). To prevent the necessity of serving so many persons upon a petition of this kind a General Order was issued on the 3rd of April, 1841, which directs, "That in all cases where any stocks or funds are or shall be standing in the name of the Accountant-general of the Court to the general credit of any cause, or to the account of any class or classes of person, and an order shall be made to prevent the transfer or payment of such stocks or funds, or any part thereof, without notice to the assignee of any person or persons entitled in expectancy or otherwise to any share or portion of such stocks or funds, the person or persons by whom any such order shall be obtained, or the shares of such stocks or funds affected by such order, shall, at the discretion of the Court, be liable to pay any costs, charges, and expenses, which by reason of any such order having been obtained, shall be occasioned to any party to the cause, or any person interested in any such stocks or funds; and henceforward, any person presenting a petition for any such order as aforesaid shall not be required to serve such petition upon the

(l) Wood v. Vincent, 4 Beav. 409.

(m) Quarman v. Williams, 5 Beav. 133.

(n) Wood v. Vincent, ubi supra;

Winchelsea v. Garrett, 1 Beav. 223.

(o) Day v. Croft, 4 Beav. 34; Trevezant v. Frazer, 3 Beav. 283.

ties to the cause, or upon the persons interested in parts of the  
 sks or funds not sought to be affected by any such order."

Charging  
 Order.

This Order, although it dispenses with the necessity of persons  
 ag served with the petition merely because they are interested  
 he fund, or parties to the cause, yet it does not do away with  
 necessity of the assignment being proved, so that the assignor  
 at still be served with a petition presented by the assignee alone  
 b. The order as now drawn up by the registrars is prefaced by  
 admission on the part of the assignee, to be bound by the Gen-  
 Order of 1841 (g).

Effect of the  
 General Or-  
 der, 3rd April,  
 1841.

When the order has been passed and entered, it must be deliv-  
 ed at the Accountant-general's office. The effect of it is, that  
 fund to which it applies cannot be paid until either it is direct-  
 discharged, or until some order is made expressly directing pay-  
 nt notwithstanding the previous stop order. A party who has  
 ained a stop order may appear at the hearing of the cause for  
 her directions, or upon a petition being presented for payment  
 the fund to the party in the cause who claims it. The Court  
 then either discharge the stop order, or direct payment to the  
 son who has obtained it, according to what appear to be the  
 hts of the parties.

Effect of a stop  
 order.

We have before seen (r), that a judgment creditor is enabled 1 & 2 Vic. c.  
 ler the 1 & 2 Vic. c. 110, sec. 14, to obtain from a Judge of 110, sec. 14.  
 of the Superior Courts an order charging government stock  
 shares of public companies belonging to the debtor. It has  
 n determined that this order can only be made by a Judge at  
 mmon Law, and not by a Judge in Equity (s). At first some  
 bt was entertained whether such an order could be made as to  
 ds standing in the name of the Accountant-general. A second  
 t, 3 & 4 Vic. c. 82, has made it clear that such funds be so  
 urged. When a charging order of this kind has been made, a  
 urt of Equity will direct a stop order as auxiliary to such a  
 urge (t). And even where such a charging order had not been  
 de, but where the creditor had caused a writ of *feri facias* to  
 ie, the Court has stopped, at the instance of the creditor, pay-  
 nt of funds in Court to the debtor (u). It seems also that  
 ere a judgment creditor has obtained a charging order under  
 statute, he may sustain a suit for the immediate protection  
 the interest he has acquired by his judgment, notwithstanding

p) *Parsons v. Groome*, 4 Beav.

(s) *Hulkes v. Day*, 10 Sim. 41.

q) 2 Beav. xi.

(t) *Ibid.*

r) *Ante*, p. 1242.

(u) *Robinson v. Wood*, 5 Beav.  
 388.

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*Stop Orders.*

**Charging  
Order.**

the six months mentioned in the statute have not expired cannot, however, upon petition, obtain payment of which the order has been applied, although the Court him a stop order (y).

(x) *Pointer v. Wilkins*, 3 Hare, 255. (y) *Whitfield v. Pri* 258.

## CHAPTER XXXVII.

## OF THE WRIT OF NE EXEAT REGNO (1).

SECT. I. — *In what Cases issued* (2).

*Ne exeat Regno* is a writ which issues to restrain a person from Nature of the  
 it of the kingdom, without the king's license or the leave of Writ.  
 rt. It is a high prerogative writ, which was originally  
 le to purposes of state only, but was afterwards extended  
 e transactions (a) (3).

mostlly used where a suit is commenced in this Court On what occa-  
 man, and he, designing to defeat the other of his just de- sions used ;  
 r to avoid the justice and equity of this Court, is about to  
 d sea, so that the duty will be endangered if he goes" (b).

*Ne exeat regno* issues, only, where the claim upon the party  
 road is equitable, and it will be refused upon a mere de- — only upon  
 Law for money ; "for there," it is said, "the defendant equitable de-  
 mands ;  
 rrested, and obliged to give bail, who will be liable, un-

leson v. Petrie, 10 Ves. 164. (b) Prac. Reg. 289.

the history and uses of this writ, see 2 Story Eq. Jur. § 1465, to

cases showing under what circumstances this writ will be granted  
 t States, see 1 Smith Ch. Pr. (2nd Am. ed.) 577, note (a) ; Vir-  
 odes v. Cousins, 6 Rand. 188 ; Alabama, Lucas v. Hickman, 2  
 North Carolina, Edwards v. Massey, 1 Hawks, 359 ; South Car-  
 on v. Richardson, 4 Desaus. 108 ; DeCarriere v. DeCalonne, 4  
 Vesey, 478, note (a), by Mr. Sumner, and for the English cases  
 Lovenden's note, ib. 592.

s writ has now become an ordinary process of Courts of Equity ;  
 s much a writ of right as any other process used in the administra-  
 tion. It must be granted when a proper case is presented. Glea-  
 sby, 1 Clarke, 551 ; Gibert v. Colt, 1 Hopk. 499 ; Mitchell v.  
 Paige, 606. It is now resorted to merely for the purpose of ob-  
 uitable bail. Mitchell v. Bunch, *ubi supra*. Whenever the de-  
 tends leaving the State, the plaintiff upon producing evidence of  
 tion, and of his equitable claims against the defendant, has a right  
 itable bail. Ib. The only proper use of this writ is to detain the  
 the defendant to respond to the decree of the Court ; and when  
 of action is such, that the *person* of the defendant cannot be touch-  
 the decree, either by execution or attachment, the writ will not  
 leason v. Bisby, 1 Clarke, 551. See Johnson v. Clendennin, 5  
 hn. 463.

Nature of the Demand.

— may be issued against an attorney;

— also in the case of alimony.

less they surrender him, and he may be as easily taken by the process as on a *ne exeat regno*" (c) (1).

It is not, however, the mere circumstance, that the defendant may be arrested and held to bail at Law, which induces the Court to refuse a *ne exeat regno* for a legal demand; it will not even grant it in cases where the defendant is not liable to arrest, as in the case of an attorney who is privileged from arrest (d).

The only exception to the rule, which requires the demand to be equitable, is in the instance of *alimony* decreed by the Spiritual Court, in which case, as the Spiritual Court cannot take bail, this Court will lend its assistance to the woman (c) (2).

(c) Per Lord Hardwicke, in *Pearne v. Lisle*, Amb. 75; vide etiam, *Brockner v. Hamilton*, 1 Dick. 154; *Grimes v. Stritho*, 2 Dick. 469; ex parte *Duncombe*, 2 Dick. 503; *Crosley v. Marriot*, ibid. 609; ex parte *Brunker*, 3 P. Wms. 314; *Anon.* 2 Atk. 210; 1 Dick. 82, S. C. *sub. nom.* *King v. Smith*; *Anon.* 1 Bro. C. C. 376; *Atkinson v. Leonard*, 3 Bro. C. C. 218.

(d) *Gardner v. —*, 15 Ves. 444.  
(c) *Pearne v. Lisle*, Amb. 75; *Smithson's case*, 2 Vent. 345; *Read v. Read*, 1 Ch. Ca. 115; *Anon.* 3 Atk. 210; ex parte *Whitmore*, 1 Dick. 143; *Head v. Head*, 3 Atk. 295; *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, ibid. 173; *Haffey v. Haffey*, 14 Ves. 261.

(1) The writ of *ne exeat* will not in general be granted, except in cases of equitable debts or claims not recoverable at law. *Atkinson v. Leonard*, 3 Bro. C. C. (Perkins's ed.) 223, note (a); 2 Story Eq. Jur. § 1470, et seq.; *Seymour v. Hazard*, 1 John. Ch. 1; *Smedburg v. Mark*, 6 John. Ch. 138; *Porter v. Spencer*, 2 John. Ch. 169, 170; *Mitchell v. Bunch*, 2 Paige, 606; *Brown v. Haff*, 5 Paige, 235; *De Rivafinoli v. Corsetti*, 4 Paige, 264; *Nixon v. Richardson*, 4 Desaus. 108; *Cox v. Scott*, 5 Har. & John. 384; *Palmer v. Van Doren*, 2 Edw. 425; *Gleason v. Bisby*, 1 Clarke, 551; *Rhodes v. Cousins*, 6 Rand. 188; *Lucas v. Hickman*, 2 Stew. 11. In North Carolina, the rule of granting a *ne exeat* only in cases of equitable demands, applies where money, not property, is the subject in controversy. *Edwards v. Massey*, 1 Hawks, 352.

The exceptions to this rule, that this writ lies only in cases of equitable demands, as stated by Mr. Justice Story, are — 1st, alimony; 2nd, cases of account. 2 Story Eq. Jur. § 1471-1473. See *Atkinson v. Leonard*, 3 Bro. C. C. (Perkins's ed.) 223, note (a). In these two cases, Courts of Law and of Equity have concurrent jurisdiction. *Atkinson v. Leonard*, *ubi supra*; *Rhodes v. Cousin*, 6 Rand. 188; *Mitchell v. Bunch*, 2 Paige, 606; *Nixon v. Richardson*, 4 Desaus. 108.

The act to abolish imprisonment for debt in New York has not deprived the Court of Chancery of the power to issue a writ of *ne exeat*, in cases of equitable cognizance, where such writ would have been allowed previous to the passage of that act. *Brown v. Haff*, 5 Paige, 235. See *Ashworth v. Wrigley*, 1 Paige, 301.

If the cause of action is such, that the person of the defendant cannot be touched under the decree either by execution or attachment, the writ will not be issued. *Gleason v. Bisby*, 1 Clarke, 551. As to the demands on which this writ is granted see *DeCarriere v. DeCalonne*, 4 Sumner's Ves. 577, 592, Mr. Hovenden's notes; *Atkinson v. Leonard*, 3 Bro. C. C. (Perkins's ed.) 218 to 224, notes; *Russell v. Asby*, 5 Sumner's Vesey, 98, note (a).

(2) See next note above.

It is, however, only where there has been an actual decree for alimony, that this Court will issue the writ, and it has refused to do so upon the mere allegation that the plaintiff was suing her husband in the Ecclesiastical Court; if she had not obtained a decree (*f*); and it seems that, even where there has been a decree for alimony, the writ will not issue pending an appeal from it by the husband (*g*). Nor will it be issued for *interim* alimony, granted *pendente lite*, before a decree (*h*); nor for any other sum than that which is actually due for the alimony and costs (*i*).

Nature of the Demand.

In cases of alimony only issued where there has been actual decree; — not issued pending appeal.

With reference to what will be considered as such an equitable demand as may be the foundation for a *ne exeat regno*, it is to be noticed, that, wherever a party has a claim against another, which he can only enforce in a Court of Equity, the Court will issue the writ; therefore, where a man had executed a bond to the trustees of his marriage settlement, a party, beneficially interested in the money secured by it, was allowed to have a *ne exeat regno* against the obligor (*k*). The same principle was afterwards acted upon by Lord Eldon, in *Grant v. Grant* (*l*). It is, however, to be observed, that, in a case where a bill was filed by a residuary legatee against the executor and a debtor to the estate stating, that, by collusion between them, the defendant was suffered to remain unpaid, and that the debtor was about to leave the country, Lord Eldon refused the application for a *ne exeat regno*, saying, he did not know any instance where it had been done (*m*). It is to be recollected, that the foundation of the equity in this case was the collusion, alleged in the bill, between the executor and the debtor; his Lordship's decision, therefore, was probably governed by the principle laid down by him in a case, mentioned by Mr. Beames in his Treatise upon the Writ of *Ne exeat Regno* (*n*), in which the plaintiff filed his bill on the ground of fraud, stating a large balance to be due to him from the defendant; and the writ was refused by Lord Eldon, who said — "Here I am called upon to grant the writ in a case of alleged fraud, and that, by the fraudulent conduct of the defendant, such a sum will be due; this is going further than the Court ever has gone." The same principle had also been acted upon by his Lordship, in *Jackson v.*

Nature of equitable demand upon which issued.

(*f*) *Shaftoe v. Shaftoe*, 7 Ves. 171; *Dawson v. Dawson*, ubi supra; *Haffey v. Coglar*, 1 Ves. J. 95, [Sumner's ed. note.] *Haffey v. Haffey*, ubi supra.

(*g*) *Street v. Street*, 1 T. & R. 605. (*k*) *Leake v. Leake*, 1 J. & W.

334. (*l*) 3 Russ. 599.

(*h*) *Ibid.* (*m*) *Graves v. Griffith*, 1 J. & W.

(*i*) *Shaftoe v. Shaftoe*, ubi supra; 646.

(*n*) Beames on *Ne exeat*, p. 56.

Nature of the Demand.

Petrie (*o*), in which the bill was filed to set aside a sale of a West India estate, suggesting that the sale was fraudulent, and that the defendant was therefore liable to account for the rents and profits, and was, on that account, indebted to the plaintiff; but his Lordship refused the writ, observing, that the foundation of the equity, in the case, was the alleged fraud "not particularly stated but only upon information and belief; considering, therefore, that, at some period, the contract will be set aside in this Court, and the purchaser will therefore become a debtor for the rents and profits, it is beyond all sight to grant this writ in such case."

The Court has also refused to grant the writ to assist process of contempt, by which payment of costs is enforced (*p*), although it has been granted for that purpose in Ireland (*q*). It seems, however, that where, upon the taxation of a Solicitor's bill, he appears to have been over-paid, the Court will grant a *ne exeat* to prevent his going abroad, and that without requiring a bill to be previously filed (*r*).

Granted where equitable jurisdiction concurrent with law, as in cases of account; — or to recover money due on a lost bond;

It is to be observed, in this place, that although the Court will not grant a *ne exeat regno* where the demand is at Law, it will not refuse it merely because the plaintiff might have relief at Law, if the case be one in which the Court of Chancery has a concurrent jurisdiction (*1*), as in the case of a suit for an account (*s*) (*2*).

So also the Court will grant the writ upon a bill to recover the amount due upon a bond which has been lost, although, by the present practice of the Courts of Law, a plaintiff may now declare upon a lost bond, which he could not do formerly; for the Court of Chancery does not consider that the circumstances of a Court of Common Law having by an extension of its rules acquired a concurrent jurisdiction, is sufficient to defeat its jurisdiction in Equity (*t*).

(*o*) 10 Ves. 165, [Sumner's ed. notes.]

(*p*) Goodman v. Sayers, 5 Mad. 471.

(*q*) Stewart v. Stewart, 1 B. & B. 73.

(*r*) Loyd v. Cardy, Prec. in Ch. 171; sed vide ex parte Bruncker, 3 P. Wm. 312.

(*s*) Jones v. Alephsin, 16 Ves. 470;

et vide Jones v. Sampson, 8 Ves. 593; Russell v. Asby, 5 Ves. 96, [Sumner's ed. 98, note (*a*)]; Amsinck v. Barclay, 8 Ves. 597; Hannay v. M'Entire, 11 Ves. 55; Howden v. Rogers, 1 V. & B. 129; Dick v. Swinton, ibid. 371.

(*t*) Atkinson v. Leonard, 3 Bro. C. C. 218.

(1) See Lucas v. Hickman, 2 Stew. 11.

(2) See ante, 1926, note; 2 Story Eq. Jur. § 1471, § 1473; Atkinson v. Leonard, 3 Bro. C. C. (Perkins's ed.) 223, note (*a*); Rhodes v. Cousins, 6 Rand. 188; Mitchell v. Bunch, 2 Paige, 606; Nixon v. Richardson, 4 De-saus. 108.

The same principle will also extend to cases of specific performance, for although in such cases the vendor may have a right to proceed at Law for the recovery of his purchase money, yet, as Equity has a concurrent jurisdiction in such matters, a *ne exeat* will be issued to restrain the vendor from going abroad till he has given security for the amount of his purchase money (*u*). It is to be observed, however, that there appears to have been some doubt whether, in cases of this description, the Court will grant the writ, before there has been some decree establishing the plaintiff's right to a specific performance. In *Raynes v. Wyse* (*x*), Lord Eldon asked whether any case had been found in which a *ne exeat* had been maintained upon an agreement, before it had been shown that the plaintiff was entitled to a specific performance. A similar doubt appears to have occurred to Lord Thurlow, in the anonymous case referred to by Mr. Dickens in his note to *Goodwin v. Clarke* (*y*); and in *Boehm v. Wood* (*z*), (in which however there had been a decree,) Lord Eldon said, "Whether the writ ought to be granted merely on the footing of contract, I shall not say a single word, this is not a mere case of contract; so that it still remains to be determined whether, in the case of a bill for the specific performance of a contract, a writ of this nature will issue upon the mere allegation of the existence of a contract, before a decree has been pronounced upon its validity." In a subsequent case, his Lordship discharged a writ which had been obtained against a vendee in a suit for a specific performance, because "the facts of the case and the transactions between the parties did not go that length which authorized him to say, he could not have a rational doubt, whether there should or should not be a specific performance of the contract; and unless the Court can make it out, to be quite clear that there must be a specific performance, it cannot grant the writ of *ne exeat regno* (*a*) (*1*)."

It is to be remarked that, in the anonymous case, above referred to as having been decided by Lord Thurlow (*b*), his Lordship is reported to have said, that, "although he go abroad, *non*

Where Courts of Law have concurrent Jurisdiction.

— or for a specific performance.

*Sed quare whether before decree?*

Will be granted although defendant has other property;

(*u*) *Boehm v. Wood*, T. & R. 332, 44; vide etiam, *Raynes v. Wise*, 2 Mer. 472, and *Goodwin v. Clarke*, 2 Dick. 497, (which, however, appears not to have been rightly decided,) vide T. & R. 345.

(*x*) Ubi supra.

(*y*) 2 Dick. 497.

(*z*) T. & R. 345.

(*a*) *Morris v. M'Neil*, 2 Russ. 604.

(*b*) 2 Dick. 597.

(1) See *Brown v. Haff*, 5 Paige, 235.

This writ will not be granted in a suit for specific performance, unless the claim of the plaintiff is a demand for money. *Gibbs v. Meraud*, 2 Edw.

32. See *Cowdin v. Cram*, 3 Edw. 231; *DeRivafrinoli v. Corsetti*, 4 Paige, 54.



Where Courts  
of Law have  
concurrent  
Jurisdiction.

— or has a  
lien upon the  
property ;

— or is en-  
titled to an  
abatement.

Not granted  
where the  
plaintiff's equi-  
ty is matter of  
grave doubt.

Nor where he  
is in a con-  
dition to sue at  
Law.

Not granted  
after defendant  
has been held  
to bail at Law.

*constat* he hath not property here ;” upon this passage, however, Lord Eldon, in *Boehm v. Wood* (c), remarks, “ I think *Dickens* must have misunderstood Lord Thurlow in that case, because the writ is granted with analogy to bail at Law ; and at Law, you never ask whether a man has property or not, but you make him give bail, leaving it to the bail to inquire whether he has property to indemnify them.” Nor does it make any difference that, in such a case, the vendor has in Equity a lien upon the property sold for the amount of his purchase money, which he may enforce by selling the property (d) ; and it seems that even where the defendant has a claim for an abatement out of the purchase money, which however has not been ascertained, the writ will be granted for the whole (e).

In a recent case, before Lord Brougham, an attempt was made to extend the principle, that in the case of a suit for the specific performance of an agreement, the Court will grant the writ,—to a suit for the specific performance of a covenant to indemnify (f).

The case was principally argued upon the question, whether a party entitled, by agreement, to satisfaction by way of damages for the non-performance of the agreement, can come into Equity to enforce that satisfaction ; and Lord Brougham was of opinion, after due consideration of the cases cited, that the right to such relief was extremely doubtful, and therefore held that, although where the equity is clear, but the facts are in dispute, the writ may be sustained (1), yet that where (as in that case) the equity is matter of grave doubt, the plaintiff, however specific his allegation may be, cannot, generally speaking, have the writ. The principal ground, however, for discharging the writ was, that the plaintiff in Equity might bring an action at Law against the defendant. His Lordship observed, “ Whether they can hold the defendant to bail or not is immaterial, though it is not said why they cannot. If he has been already arrested, that, of itself, is a conclusive answer to the application for a *ne exeat* ; if not, no reason is given why he may not be arrested now, in a new suit.”

But although the Court of Chancery will grant this writ in cases where the Court has concurrent jurisdiction with the Courts of Law, it will not permit the defendant to be harassed by a *ne exeat*

(c) T. & R. 338.

(d) Ibid. 346.

(e) Ibid.

(f) *Jenkins v. Parkinson*, 2 M. & K. 5.

(1) To sustain this writ sufficient equity must appear on the face of the bill. Mere apprehension that the defendant will misapply funds in his hands, or abuse his trust, is not sufficient. *Woodward v. Shatzell*, 3 John. Ch. 412.

*regno*, where he has already been held to bail in a Court of Law or the same demand; and if, under such circumstances, the writ has been issued, it will be discharged. Therefore where the defendant had entered into a contract with the plaintiff for the purchase of an estate, and the plaintiff had arrested him at Law and held him to bail for the amount of the purchase-money, which bail was afterwards discharged in consequence of the plaintiff having continued the suit, a writ of *ne exeat regno*, subsequently obtained by the same plaintiff upon a bill to enforce the same contract, is discharged (*g*).

Demand must  
be pecuniary.

30, also, where a defendant had been held to bail at Law, in an action commenced against him by the plaintiff, for the balance in account, and it was afterwards found more convenient to proceed in Equity by bill, whereupon the defendant was discharged from his arrest at Law, and a *ne exeat* was issued against him by this Court, Lord Eldon discharged the writ (*h*).

It may be mentioned, however, that although the Court will not grant or sustain the writ of *ne exeat regno*, where the party has already been arrested or held to bail at Law, it will not, after the writ has been discharged in Equity, interfere to direct the party to be discharged from a subsequent arrest at Law for the same demand, but will leave it to the Court of Law to determine whether, under the circumstances, the Common Law process ought to be made available (*i*).

Defendant arrested at Law,  
after a *ne exeat regno*, will  
not be discharged.

In order to authorize the issue of a *ne exeat regno*, the demand must not only be equitable, but it must be a pecuniary demand (1), therefore the Court has refused to grant the writ upon a bill to enforce an agreement by which the defendant had undertaken to give the plaintiff a bill of exchange as a security for a demand (*k*). And the demand must not only be pecuniary, but it must be actually due (*l*) (2). The writ will not be issued in respect of a

Demand must  
be pecuniary,

— and must  
be actually  
due.

- (*g*) *Raynes v. Wyse*, 2 Mer. 472. (*k*) *Blaydes v. Calvert*, 2 J. & W. 211.  
(*h*) *Amsinck v. Barclay*, 8 Ves. 211.  
(*l*) *Whitehouse v. Partridge*, 3 Walker v. Christian, 7 Sim. Swanst. 365, 377.

1) Ante, 1929, note.

2) The debt, for which this writ will be issued, must be certain in its nature, and actually payable and not contingent. 2 Story Eq. Jur. § 1474; *Man v. Sherman*, 3 Bro. C. C. (Perkins's ed.) 370, notes. It will not therefore, where the demand is of a general unliquidated nature, or is in the nature of damages. 2 Story Eq. Jur. § 1474; *Gibbs v. Meraud*, 2 Edwards, 482.

There must be a debt existing at the time, and so far mature, that present payment or performance can rightfully be demanded. *Gleason v. Bisby*, 1 Moke, 551; *Rhodes v. Cousins*, 6 Rand, 188; *Cox v. Scott*, 5 Harr. &

Demand must  
be actually  
due.

contingent claim; therefore where it was nothing more than the demand of a wife against her husband, by virtue of a marriage agreement, in which the defendant obliged himself to secure 1700 out of his estate, for his wife, as a provision, in case she survived him, Lord Hardwicke refused the application, as the contingency was one which might never happen (*m*). But even where the debt's becoming due does not depend upon a contingency, but is *certain though future*, the writ cannot be granted; and in *Whitehouse v. Patridge* (*n*), Lord Eldon says, "I recollect a scandalous instance of advantage taken of that rule: a creditor having given time to his debtor, from the 1st of January to the 1st of July, in the last week in June, the debtor thought proper to attempt to leave the kingdom, and on great consideration, this Court decided that it could not grant the writ." In that case, his Lordship refused a *ne exeat* to restrain the defendant from going abroad for the purpose of evading the payment of a sum of money which he had been ordered to pay into a banking house, as the condition of the Court's granting an injunction, because the time when the party was bound by the order to pay the money, *i. e.* a month from the date of the order, was not arrived. His Lordship, however, stated that if between the date of an order for an injunction and the payment of the money into Court at a future time, there is a substantial threat, that the party, who ought to pay, will go abroad, the practice of the Court is to order him to pay the money *instantly* or to dissolve the injunction (*o*). The fact is, that, to entitle the plaintiff to the writ, he must be in a situation either to swear positively that so much is actually due (*p*), or in some other manner to point out to the Court the sum to be marked on the writ (*q*); upon which principle it is, that, in cases of alimony, the writ has, as we have seen, been strictly confined to the arrears of alimony actually due, and costs (*r*). The only exception to the rule, which requires that the plaintiff should be in a situation to swear positively that a certain sum of money is due, is in the case of a suit for an account, in which it will be sufficient, if the plaintiff can swear, that, *according to the best of his belief*, any particular sum, *at the*

(*m*) Anon. 1 Atk. 521.

(*n*) 3 Swanst. 377; et vide Cock v. Ravic, 6 Ves. 284; Dawson v. Dawson, 7 Ves. 174; Haffey v. Haffey, 14 Ves. 261.

(*o*) 3 Swanst. 375.

(*p*) Rico v. Gaultier, 3 Atk. 501;

Anon. 1 Bro. C. C. 376; Sherman v. Sherman, 3 Bro. C. C. 370, [Perkins's ed. notes (*a*) and (*b*)]; vide etiam Butler v. Butler, cited in Beames on Ne ex. p. 52.

(*q*) Boehm v. Wood, T. & R. 339.

(*r*) Ante, p. 1927.

John. 384; De Rivaflinoli v. Corsetti, 4 Paige, 264; Seymour v. Hazard, 1 John. Ch. 1; Brown v. Haff, 5 Paige, 235; 2 Story Eq. Jur. § 1474; Porter v. Spencer, 2 John. Ch. 169.

least, would be found justly due to him upon a balance, if the account were taken (s) (1).

Demand must be actually due.

This writ was originally applied to persons domiciled in this country, "but for a long course of years it has been settled, that, if a man lives in Scotland (t) or Ireland (u), or in our colonies (z), or in other parts of our dominions, (and in parts too where there can be no arrest for debt,) yet if, being a debtor, he comes here, and the party who is his creditor can pledge his oath that he is such a debtor, if it is a legal debt, he may be held to bail, and if it is an equitable debt, this writ of *ne exeat regno* may issue against him, although he comes here for a particular purpose only, and intends to return immediately.

Will be granted where defendant's domicile is out of the kingdom,

Upon this principle the Court acted, in *Atkinson v. Leonard* (y), although the where it granted the writ at the instance of an inhabitant of one West India colony against an inhabitant of another, who was only here for a casual purpose. It is to be remarked that, in the above case, the debt was contracted in the colony, and might have been recovered in the Courts there, according to the law of this country which was then in force; but that, in *Robertson v. Wilkie* (z), Lord Hardwicke appears to have held that, where such was the case, he would not grant the writ, although he would where the subject matter arose in Gibraltar and Minorca, where the laws were not the same as here. It is, however, now settled, in conformity with *Atkinson v. Leonard* and *Jackson v. Petrie* (a), that a writ of *ne exeat* may issue against any defendant whose residence is out of England, in respect of a debt contracted abroad and recoverable there (b).

although the demand might be enforced there.

(s) *Rico v. Gualtier*, ubi supra; *Butler v. Butler*, ubi supra; *Jackson v. Petrie*, 10 Ves. 165.

(t) *Mackintosh v. Ogilvie*, 1 Dick. 119; *Done's case*, 1 P. Wm. 263. As to the form of the recognizance in such case, vide post.

(u) *Howden v. Rogers*, 1 V. & B. 129; see vide *Bernal v. The Marquis of Donegal*, 11 Ves. 43, where it was refused on the ground of parliament-

ary privilege, the defendant being a representative in Parliament of an Irish borough.

(z) Per Lord Eldon, in *Flack v. Holm*, 1 J. & W. 418.

(y) 3 Bro. C. C. 218.

(z) Amb. 177; 2 Dick. 786, S. C.; vide etiam, *Pearne v. Lisle*, Amb. 76, S. P.

(a) Ubi supra.

(b) *Howden v. Rogers*, 1 V. & B. 129.

(1) The plaintiff, even in a matter of account, must swear positively to a debt or balance due to him, but he need swear only according to his belief as to the amount. *Thorne v. Halsey*, 7 John. Ch. 159. See *Gernoe v. Boccaline*, 3 Wash. C. C. 130; *Gibert v. Colt*, 1 Hopk. 600; *Denton v. Denton*, 1 John. Ch. 441.

If the plaintiff swears, that so much is due upon an account, without entering into any explanation, that is sufficient; but if he swears that so much is due, and then explains how it arises, and, in making out the account, it ap-

Where Defendant is domiciled abroad.

Whether it will be granted where plaintiff and defendant are both foreigners.

Will not be granted where plaintiff is resident abroad.

May be granted against a man going abroad on his ordinary business.

It seems also, that the writ will be granted where the plaintiff is an Englishman and the defendant a foreigner (c); but whether it can be granted where the plaintiff and defendant are both foreigners and the debt was contracted in their own country, appears to be doubtful (d); although if the question is between two foreigners, but the subject matter has arisen in this country, the writ will be granted (e) (1).

It may be observed here, that, in *Atkinson v. Leonard* (f), it is stated, that the plaintiff was usually resident in the Island of Antigua, and that the defendant resided in Tortola, and had come to this country casually, and that no objection was taken to the writ because of the plaintiff's residence out of the jurisdiction of the Court; in *Hyde v. Whitfield* (g), however, Lord Eldon appears to have considered the circumstance of the plaintiff's being a resident in Scotland, a decided ground of objection to the writ; and, in *Smith v. Nethersole* (h), Lord Brougham discharged a writ of *ne exeat regno*, which had been issued at the instance of a plaintiff who was resident in Jamaica, against a defendant who was resident in the same colony, on the ground that the plaintiff resided abroad, and that his visit to this country was colorable and temporary only. And the same rule has been acted upon by Sir L. Shadwell in subsequent cases (i).

A doubt appears to have been raised, in *Stewart v. Graham* (k) whether a *ne exeat regno* can be granted against a man going abroad in the course of his ordinary business, but Lord Eldon granted the writ, upon the authority of *Dick v. Swinton* (l) where

(c) *Flack v. Holm*, 1 J. & W. 415.

(d) *Ibid.*; and vide *Talleyrand v. Boulanger*, cited *ibid.* 417, and 4 Ves. 587.

(e) *De Carriere v. De Calonne*, 4 Ves. 577, [Sumner's ed. notes.]

(f) *Ubi supra*.

(g) 19 Ves. 342.

(h) 2 R. & M. 450.

(i) *Douglas v. Terry*, 2 R. & M. 450, n., and *Walker v. Christian*, 19 Ves. 313.

(k) 1 V. & B. 371, vide etiam, *Tomlinson v. Harrison*, 8 Ves. 32; *Stiches v. Lance*, 7 Ves. 417; *Lloyd v. Cardy*, Prec. in Ch. 171; *Baker v. Dumesque*, 2 Atk. 69.

appears that such sum is not due, he cannot have the writ. *Flack v. Holm*, 1 Jac. & Walk. 407, 408.

(1) The writ may be granted in a suit between foreigners, and in respect to demands arising abroad. *Mitchell v. Bunch*, 2 Paige, 606. Upon a bill filed against a foreign executor or administrator, to compel him to account for trust funds which he has received abroad and brought with him into the State, if he is about to depart and go beyond the bounds of the State, he may be arrested on a *ne exeat* and held to equitable bail, as in other cases. *McNamara v. Dwyer*, 7 Paige, 239. See also, *Gibert v. Colt*, 1 Hopk. 496; *Woodward v. Shatzell*, 3 John. Ch. 412; *De Carriere v. De Calonne*, 4 Sumner's Vesey, 577, note (a); 2 Story Eq. Jur. § 1475, and note.

t, had been issued to restrain the captain of an East India  
m proceeding on his voyage (1).  
question whether a *ne exeat regno* can be granted against a  
*vert*, has been the subject of investigation in a former part  
Treatise (m): whether it can be granted at the suit of a  
*vert* against her husband has been much discussed; but  
n be no doubt that, in the case of alimony a *feme covert*  
ain a writ of *ne exeat regno* against her husband (2),—  
she can obtain it in any other case does not seem equally

For and  
against whom  
granted.

Whether it  
can be granted  
against *feme*  
*covert*,

— or at the  
suit of a *feme*  
*covert* against  
her husband.

*Semle*, it can-  
not,

dgwick v. Watkins (n), Lord Thurlow refused to grant the  
the instance of a *feme covert* administratrix against her  
l, on her affidavit, that he had possessed the assets and was  
road. His Lordship said, that the evidence of the wife  
t be received against her husband in a case of this nature,  
the only instance of the kind found in the books, was a  
which Serjeant Puckering granted a writ on such an affi-  
ut that, on Lord Ellesmere's coming to the Great Seal  
afterwards, a similar application was made to him, on the  
y of that case, which he refused (o). It appears, from  
urflow's judgment in the case, as reported in Vesey, that  
ship was of opinion that the only instance in which a  
fidavit can be used against her husband, is where she ap-  
security of the peace; but this observation must be in-  
p), as in the case of alimony the writ will be granted on  
vit of the wife (q).

— except in  
the case of ali-  
mony;

presumed also, that where a married woman has property  
her separate use, the Court will, in like manner, allow  
to make an affidavit in support of an application to restrain  
and from defeating his wife's right, by removing out of the  
ion of the Court (r). These cases, however, are peculiar,  
those in which Courts of Equity recognize the right of a  
aintain a suit against the husband; but the case of Sedg-  
Watkins was one in which the Court does not recognize

or of property  
settled to her  
separate use.

te, p. 191. (r) In Bagot v. Bagot, where real  
ro. C. C. 11; 1 Ves. J. 49, estate was settled to the separate use  
of a married woman, the V. C. of  
England granted a receiver against  
the husband, before answer upon no-  
tice, the facts of the case being ver-  
ified by the affidavit of the wife alone  
MS. Dec. 1838.

M'Belt's note to Sedg-  
Watkins, 3 Bro. C. C. 11.  
De Manneville v. De  
e, 10 Ves. 56.  
Shaftoe v. Shaftoe, 7 Ves.

s party, against whom a final decree is made, intends to remove be-  
urisdiction of the Court before the decree can be enforced by ex-  
ne exeat will be granted. Dunham v. Jackson, 1 Paige, 629.  
ton v. Denton, 1 John. Ch. 264.

For and  
against whom  
granted.

Writ may be  
issued on be-  
half of a  
lunatic.

Where plain-  
tiff has made  
himself liable  
as surety.

Need not be  
prayed by bill.

the right of a married woman to sue her husband: and, consequently, the determination of Lord Thurlow to reject her affidavit, although the grounds of it are stated by the reporter in too general terms, was strictly correct.

In *Stewart v. Graham* (s) a writ of *ne exeat regno* was applied for, on behalf of a lunatic, by his committee, and it was objected that it could not be issued, because the affidavit was made by the committee; but Lord Eldon held that the objection was not available, because, at Law, they hold to bail on the oath of the assignee where the bankrupt will not make affidavit; his Lordship also added, that he had been informed, that they have held to bail on the oath of a committee.

The Court will also grant the writ at the instance of a party who has made himself liable to the debt of another, even though he has not been called upon to pay the demand (t).

It is not necessary, to entitle a plaintiff to a writ of *ne exeat regno*, that it should be prayed by the bill, although, where the application is intended to be made immediately on the filing of the bill, it is usual to pray it, unless either at the time of filing the bill or of amending it he had knowledge of the defendant's intention to go abroad (u). It frequently, however, happens that the defendant's intention to go abroad arises, or is first discovered, in the course of the case, and then there is no doubt that the writ would be issued, though not asked for by the bill (1). In *Collinson v. —* (x), Lord Eldon says, "when this prerogative writ came to be applied as a civil process, it would have been an extraordinary exercise of jurisdiction to refuse it merely as not prayed in a stage of the proceedings where there was no pretence for praying it. If when the bill was filed, the defendant did not intend to leave the kingdom, it would have been highly improper to pray the writ; a groundless suggestion that the defendant means to abscond would press too harshly and would operate to create the very mischief which the Court, by permitting the motion without notice, means to prevent. The omission to pray the writ, therefore, forms no objection."

(s) 19 Ves. 313.

(t) *Sealy v. Laird*, 2 Swanst. 363.

(u) *Moore v. Hudson*, Mad. & Gel.  
219; *Sharp v. Taylor*, 11 Sim. 50;

ante, p. 448, and see *Barned v. Laing*,

13 Sim. 255.

(x) 18 Ves. 353.

(1) This writ may be applied for at any stage of the suit. *Dunham v. Jackson*, 1 Paige, 629. If the party, in the progress of the the suit, threatens to leave the country, the writ may be applied for by petition, without its being prayed for in the bill, and without an amendment to insert such prayer; 1 Hoff. Ch. Pr. 91. See *Gibert v. Colt*, 1 Hopk. 498; *Moore v. Hudson*, 6 Mad. 218.

In general the writ can only be granted upon a bill filed (1), but where, upon the taxation of a solicitor's bill, he was reported to have been overpaid, the client obtained a *ne exeat regno* to prevent his going abroad, *though there was no bill in Court whereon to ground the writ* (y). In *ex parte Brunker* (z), however, Lord Talbot discharged a writ, which had been granted by the Master of the Rolls, without bill filed, observing that, in his experience, he never knew this writ granted or taken out without a bill in Equity first filed. But it is to be observed, that in the last case, the plaintiff's demand was one which could only be enforced by bill, whereas, in the first case, the demand was capable of being enforced, by means of the authority which the Court exercises over solicitors, as officers of its own.

Upon the application of the Defendant against the Plaintiff.

Only granted upon bill filed. *Secus*, in the case of a Solicitor found to be over-paid taxation.

In *Whitehouse v. Partridge* (a), which has been already referred to (b), an application for a *ne exeat* was made on behalf of a defendant, to restrain a plaintiff from going abroad, who, upon obtaining an injunction, had been ordered to pay a certain sum of money, and although the *ne exeat* was refused, for the reason before stated, it was stated by Counsel at the Bar, and not denied, that a defendant may obtain a writ of *ne exeat regno* without filing a bill.

May be granted at the instance of defendant against Plaintiff.

## SECTION II.

### *In what Manner granted.*

THE application for a writ of *ne exeat regno* may be made by petition (b), but it is usually now obtained by motion which may be *ex parte*, the reason of which is that the giving notice might operate to occasion the mischief which the writ is intended to prevent, by giving the party an opportunity of removing from the jurisdiction (c). For the same reason, notice of the motion is not required even after the defendant has appeared (d); but the ap-

Application for may be by motion, *ex parte*;

(y) *Loyd v. Cardy*, *Proc. in Ch.* 171; ante, p. 1938.  
(z) 3 P. Wms. 312.  
(a) 3 Swans. 365.  
(c) Ante, p. 1933.

(b) 1 Turn. & V. 987.  
(c) Vide *Collinson v. —*, 18 Ves. 353.  
(d) *Elliot v. Sinclair*, *Jac.* 545.

(1) See *Mattocks v. Tremaine*, 3 John. Ch. 75; *The Georgia Lumber Co. v. Bissell*, 9 Paige, 225.

Under the same bill a *ne exeat* as well as an injunction may be granted. *Bryson v. Petty*, 1 Bland, 182.



Affidavit in support of.

— or by petition

May be to the Master of the Rolls;

or one of the Vice-Chancellors.

Affidavit in support of.

By whom made.

May be made by an infant;

must be positive as to debt.

plication must be supported by an affidavit of the debt, and of the intention of the party to go abroad (*e*).

*The Master of the Rolls*, "according to all which is to be found in the books, has as much jurisdiction, to direct the writ to issue, as the Lord Chancellor himself has, though it is by the Lord Chancellor that the seal must be put to the writ, and till that has been done, according to the order of the Court, there is nothing which can be denominated a writ" (*f*).

The same observation will apply to the Vice-Chancellors, who, by the Statutes under which they are appointed, are authorised to hear and determine all matters which the Lord Chancellor has power to hear and determine (*g*).

It does not appear to be necessary that the affidavit should be made by the plaintiff himself, although it is usually made by him, unless where he is under some legal disability, as in the case of lunacy, when, as has been already stated, it may be made by his committee (*h*); a *feme covert* may also, as we have seen in certain cases, make an affidavit in support of a motion for a *ne exeat*, to restrain her husband from going abroad (*k*).

In *Roddam v. Hetherington* (*l*), the affidavit appears to have been made by an infant who was plaintiff, by his next friend; and the writ was issued, but afterwards discharged, with costs to be paid by the next friend, because the infant had sworn positively to facts which, from his age, he could only have known from information.

No rule is more strong than that the writ shall not issue without a positive affidavit, and that an affidavit, as to information and belief only, will not be sufficient (*m*) (1). The affidavit must be as

(*e*) In *Roddam v. Hetherington*, 5 Ves. 91-95, Lord Loughborough, C., said, he did not recollect any instance where a *ne exeat regno* had been applied for upon admission in the answer, but the admissions would certainly do as well as an affidavit. [The Court may and ought to take the answer into consideration. *Gibert v. Colt*, 1 Hopk. 500.] An affidavit will also be dispensed with, where the demand has been established by a Master's report duly confirmed.

*Collinson v. —*, 18 Ves. 353; *Moore v. Hudson*, 6 Mad. 218.

(*f*) Per Lord Eldon in *Boehm v. Wood*, T. & R. 342.

(*g*) 53 Geo. III. c. 24; and 5 Vict. c. 5.

(*h*) Ante, p. 1824.

(*k*) Ante, p. 1862.

(*l*) 5 Ves. 91 [Sumner's ed. notes].

(*m*) *Roddam v. Hetherington*, *supra*; *Darley v. Nicholson*, 1 Dr. & W. 66.

(1) See *Sherman v. Sherman*, 3 Bro. C. C. (Perkins's ed.) 370, notes (*a*) and (*b*); *Flack v. Holme*, 1 Jac. & Walk. 405; *Howden v. Rogers*, 1 Ves. & Bea. 129; *Mattocks v. Tremaine*, 3 John. Ch. 75; *Rhodes v. Cousins*, 6 Rand. 188; *Gibert v. Colt*, 1 Hopk. 500; *Gernoe v. Boccaline*, 2 Wash. C. C. 130; *Thorne v. Halsey*, 7 John. Ch. 193; 1 Hoff. Ch. Pr. 93-95.

In *Smedburg v. Mark*, 6 John. Ch. 138, the Court refused an application for a *ne exeat*, because, for one reason, the application was against an execu-

itive as to the equitable debt, as an affidavit of a legal debt to d to bail (n), and even where the affidavit is positive, yet if it ear that, under the circumstances, the deponent could only e acquired his knowledge from the information of others, it be insufficient. Thus, in *Roddam v. Hetherington*, above re- ed to, where a *ne exeat regno* had been obtained on the affida- of the plaintiff, who was an infant, it was discharged, although affidavit was positive; because it appeared, from the statement the bill, that the plaintiff was eighteen years of age, that he ld only have known some of the facts deposed to from the in- mation of others.

Affidavit in support of.

The only exception to the rule, that the affidavit must be posi- is, as we have seen, in the case of an account, in which the ntiff may swear, that, to the best of his belief, such a sum will ue to him on the balance (o) (1).

Secus in the case of an account.

t is also required, that the affidavit, on which the application this writ is founded, should show that the defendant intends g abroad (2). It seems, formerly, to have been thought, that affidavit was, in this respect, sufficient, if it merely stated a ef of the defendant's intention to quit the kingdom, without g into the circumstances upon which that belief was found- p). But this rule has been very properly qualified by later sions; and it is now held that the affidavit, to obtain this writ, t be positive as to the defendant's intention to go abroad, or to hreats or declarations to that effect, or to facts evincing it (q). dham v. Oldham (r), the Court observed, "it is not sufficient

Must show that defendant intends to go abroad.

) *Jackson v. Petrie*, 10 Ves. 164. Ante, p. 1933.  
) *Beames on ne ex. 33*; *Russell v. Ashby*, 5 Ves. 96 [Sumner's ed. note]; see also *Chapeaurouge v. Carr*, in a note to *Amsinck v. Barklay*, 5 Ves. 597.  
) *Beames on ne ex. 33*; *Oldham v. Oldham*, 7 Ves. 410; *Etches v. Etches*, 7 Ves. 417 [Sumner's ed. note

(a)]; *Amsinck v. Barklay*, ubi supra; *Hannay v. M'Entire*, 11 Ves. 54; *Jones v. Alephsain*, 16 Ves. 470; see also *Taylor v. Leitch*, 1 Dick. 380; and *Sherman v. Sherman*, 3 Bro. C. C. 370; *Hyde v. Whitfield*, 19 Ves. 342; and see *Hyde v. Whitfield*, ubi supra.  
(r) 7 Ves. 410.

and there was no charge or affidavit that assets had come to the hands of defendant. See also *M'Namara v. Dwyer*, 7 Paige, 239. Ante, 1933, note.

) *Mattocks v. Tremaine*, 3 John. Ch. 75. There ought to be a positive writ of a threat or purpose to go abroad, ib. 76, and that the debt would be endangered thereby. Ib.; *Rhodes v. Cousins*, 6 Rand. 188. The affidavit need not, however, state that the defendant is going abroad for the purpose of avoiding the payment of the debt. *Russell v. Ashby*, 7 Ves. 96 and notes. By the Act of Congress, 2d of March, 1793, § 5, it is provided that "no writ of *ne exeat* shall be granted, unless it is commenced, and satisfactory proof shall be made to the court or judge granting the same, that the defendant designs quickly to depart from the United States."

Affidavit in  
support of.

to show that another person said so;" but this must be understood with some qualifications; for, in a subsequent case where the affidavit was made, "not by the plaintiff, but another, to his belief of the defendant's intention to quit the kingdom, upon information, received from *two persons of his family*, that they were about to go to the Isle of Man," the writ was granted by Lord Eldon; who, after stating that the point had frequently embarrassed him, expresses himself thus:—"But there are cases in which the Court appears to have regarded, and acted upon, the nature of the information and belief. The information is, in this instance, given by *persons of the defendant's family*; who, therefore, could not be brought forward to make an affidavit: and the circumstances, that the party has not made the affidavit, has not been considered as objection (s). But, it would seem, from Lord Eldon's judgment in the case of *Percy v. Powell* (t), that the person from whom the information was received should not be the wife of the defendant.

In a case obtained, by Mr. Beames, from the Registrar's Book, Lord Hardwicke granted the writ upon an affidavit, which, after stating that the defendant had denied himself, and kept out of the way, and had sold off his goods, and left his house uninhabited, proceeded thus:—"that the plaintiff, upon inquiry after the defendant, was informed, that one Mr. Bullock acted as an Agent for him; and that, thereupon, the plaintiff and his solicitor, on, &c., applied to the said Mr. Bullock, who informed the plaintiff, that, unless he would take an assignment of two houses, (to which the defendant pretends he was entitled, if he arrived at the age of thirty,) and give the defendant a discharge for all the monies he has received, &c., that he will immediately go abroad, and will either take with him the said deeds, writings, &c., or will burn or destroy the same" (u).

Not necessary  
to allege that  
defendant is  
going abroad  
to avoid the  
jurisdiction.

The questions, how far it is necessary for the affidavit to allege, that the defendant intends going abroad, *to avoid the jurisdiction*, or that the debt will be endangered by his quitting the kingdom, have been more than once under discussion. In one instance, Mr. Scott moved the Court to discharge an order for a *ne exeat regno*, on the ground that the affidavit on which it was issued, did not go so far as to state, that the plaintiff would be in danger of losing

(s) *Collinson v. —*, 18 Ves. 353; lib. A. 1749, fo. 5. The defendant Beames on *ne ex.* 34.

(t) Beames on *ne ex.* 85; vide *Sedgwick v. Watkins*, 3 Bro. C. C. 11; 1 Ves. J. 49, S. C. et ante, p. 466. had been appointed by the plaintiff to collect in an intestate's estate, and had the deeds, &c. in his possession for that purpose; vide Beames on *ne ex.* 36.

(u) *Knight v. Watts*, Oct. 31, Reg.

his claim by the defendant's leaving the kingdom (x); but Lord Thurlow said, "that it might have been stronger if the plaintiff had sworn he would be in danger of losing his claim; yet, as the writ was brought for the demand, the defendant's quitting the kingdom, whereby the Court lost its jurisdiction, was a strong implication that it was with a view to avoid it," and therefore refused the writ (y.) In two subsequent cases, *Etches v. Lance* (z), and *Tomlinson v. Harrison* (a), the question was again agitated; but in the case of *Baker v. Haily* does not appear to have, on either occasion, occurred to the Court. The case of *Etches v. Lance* stood over, that precedents might be searched; and the result of the examination proving it to have been settled, since the time of Lord Hardwicke, that it is sufficient, if the affidavit alleges that the plaintiff will be in danger of losing the debt, the writ was granted. This doctrine was again acted upon in *Tomlinson v. Harrison*; and it may, therefore, be considered as settled, that the affidavit will be sufficient, if it states, that the debt will be endangered by the defendant's quitting the kingdom, without stating at the object is to avoid the jurisdiction (b) (1).

Affidavit in support of.

Must state that debt will be endangered.

The order for the writ having been passed and entered, must be delivered to the plaintiff's clerk in Court, who will, thereupon, take out the writ, and get it sealed by the proper officer. The form of the writ is as follows (c), viz.:—

VICTORIA, &c. — To our Sheriff of——, greeting: Whereas the plaintiff is represented to us in our Court of Chancery, on the part of A. B., complainant, against C. D., defendant, (amongst other things), at law, the said defendant, is greatly indebted to the said Tom-

Form of the writ (2).

(x) Vide Beames on *ne ex*. 38, who observes, "The reporter must have taken the authorities cited, which not appear to be in point."

(y) *Baker v. Haily*, 2 Dick. 633.

(z) 7 Ves. 417.

(a) 8 Ves. 38.

(b) *Stewart v. Graham*, 19 Ves. 1; *Boehm v. Wood*, 1 Turner & Aspell, 332.

(c) There are two forms of this writ given in Fitzherbert, one directed to the party himself, and the other to the Sheriff, vide F. N. B. 85. In *Tomlinson v. The Marquis of Donegal*,

11 Ves. 43, the defendant being entitled to privilege of Parliament, the application for the writ in the former form, on the ground that, as the efficacy of the writ did not depend upon any security to be given, or legal restraint of the person, but merely upon the queen's command to the defendant not to go to foreign parts, it did not involve any breach of privilege; but Lord Eldon held, that the writ must be in the form usually followed in this Court, and that he had no authority to alter it.

(1) Ante, 1939, note; *Mattocks v. Tremaine*, 3 John. Ch. 75; *Rhodes v. Adams*, 6 Rand. 188.

(2) See 3 Hoff. Ch. Pr. 23, 24.

Form of the writ.

plainant, and designs quickly to go into parts beyond the seas, by oath made in that behalf appears), which tends to the great prejudice and damage of the said complainant, Therefore, in order to prevent this injustice, we do hereby command you, that you do without delay, cause the said C. D. personally to come before you, and give sufficient bail or security, in the sum of ———, that he, the said C. D., will not go, or attempt to go, into parts beyond the seas, or to Scotland, without leave of our said Court; and, in case the said C. D. shall refuse to give such bail or security, then you are to commit him, the said C. D., to our next prison, there to be kept in safe custody, until he shall do it of his own accord; and when you shall have taken such security, you are forthwith to make and return a certificate thereof to us, in our said Court of Chancery, distinctly and plainly under your seal, together with this writ. Witness ourself at Westminster, the ——— day of ——— in the ——— year of our reign (d).

For what sum to be marked.

The writ must be marked on the back with the amount of the sum for which the defendant is to give security, *in words of length (e) (1)*. This is done as a guide to the Sheriff, to take sufficient security, by bail bond, for the defendant's yielding obedience thereto (f).

Where issued against a personal representative;

Where the writ is issued against a personal representative, at the instance of a legatee, or person claiming a share of the residue, it must be marked for the whole amount due from the defendant, not to the plaintiff only, but to all the other persons interested in the estate (g); and it seems, from a case cited by Mr. Beames, from the Registrar's book, that the Court will sometimes extend the amount of the security required, beyond that of the debt ~~sum~~.

(d) Har. (ed. Newl.) 537; Hinde, 611. (f) Hinde, 611.

(g) Pannell v. Taylor, T. & R. 100.

(e) Beames on *ne ex.* 93.

(1) The Court, allowing the writ, directs a sum, in which the defendant is to be held to bail upon it, sufficient to cover not only the existing debt but a reasonable amount of future interest; having regard to the probable duration of the suit. And the sheriff must take a bond in the sum directed by the Court, without any addition. *Gibert v. Colt*, 1 Hord. 500. See *M'Namara v. Dwyer*, 7 Paige, 239; *Gleason v. Clisby*, 1 Clarke 551.

If the writ is actually marked by the clerk, it will be presumed to have been done so in pursuance of the order of the Court. *Gleason v. Clisby*, 1 Clarke, 551.

for the purpose of covering the costs of proceedings at Law (*h*). *Duty of Sheriff.*  
*Boehm v. Wood* (*i*) also, the writ was marked for the full — where  
 amount of the purchase money, though the defendant was entitled issued against  
 to an abatement, the amount of which, however, had not been as a purchaser.  
 asained.  
 Where the writ has been indorsed for a larger sum than is real- Where in-  
 ize, there is no doubt that the Court will make an order that dorsed for too  
 security shall be for so much only as is really due, without large a sum.  
 showing the writ, and that, too, upon the hearing of a motion to  
 sh it (*k*).

## SECTION III.

## In what Manner executed.

to carry this process into effect, the writ must be delivered to *Duty of*  
 proper Sheriff, with instructions for executing it. By the Sheriff.  
 as of the writ, the Sheriff is to cause the party, personally, to  
 be before him and give sufficient bail or security in the sum in-  
 ded on the writ, that he will not go, or attempt to go, into parts  
 and the seas, without leave of the Court, and, on his refusal,  
 s to commit him to the next prison (*l*). It is said, that it is an *Doors not to be*  
 se of this process to break open doors, and take the party in broken open.  
 ; however, where this had been done, the Court refused to set  
 at liberty (*m*) (*1*).  
 t is not necessary to serve a subpoena upon the party against *Service of Sub-*  
 m this writ is issued. *pæna not*  
 When a caption is made, the defendant, to obtain his discharge *necessary.*  
 of custody, must execute a bond, with two sufficient sureties, *In what man-*  
 he Sheriff, in double the sum marked on the writ (*2*), condi- *ner defendant*  
*may obtain his*  
*discharge;*  
 t ) *Bonner v. Worthington & (k) Pannell v. Tayler, T. & R.*  
 t, *Beames on ex. 94; Reg. lib. 100.*  
 519, fo. 12. (*l*) 1 Turn. & T. 990.  
 ) T. & R. 332. (*m*) *Prac. Reg. 290; Curs. Canc.*  
 455.

) But see, in reference to acts done through an abuse of process, *Ilaley*  
*Nichols*, 12 Pick. 270, where an attachment was held unlawful and inval-  
 when made by an officer who had broken open a dwelling-house by forc-  
 an outer door, against the prohibition of the owner, with the direct and  
 wed purpose of making such attachment of the owner's goods in the  
 elling-house. See also the authorities cited and commented on by the  
 rt, in *Ilaley v. Nichols*, ubi supra.

) In *Gibert v. Colt*, 1 Hopk. 500, the Court held, that the sheriff is not  
 ouble the sum marked, but is to take the bond in the sum directed by  
 Court, without any addition. See ante, 1942, note. See the form of a

Duty of  
Sheriff.  
— bail to be  
given to Sher-  
iff only.

tioned not to go or to attempt to go into parts beyond the seas, or into Scotland, without the leave of the Court (*n*).

It is said, in a book of practice of considerable authority, that, besides giving bail to the Sheriff, the party arrested must also, with two sureties of the like description, enter into a recognizance to the Master of the Rolls and the senior Master in Chancery, in the same sum and upon the like condition as the bond entered into to the Sheriff (*o*); and other books of authority have laid it down, that a person taken by the Sheriff, on a *ne exeat regno*, must enter into three different bail bonds, before he can be set at liberty; — viz. one to the Sheriff, another to the Master of the Rolls, and a third to a Master in Chancery (*p*); this, however, does not appear to be a correct statement of the practice, according to which there seems to be little doubt that the Sheriff may discharge the party out of custody, upon his giving bail, or security to himself, according to the requisition of the writ, without requiring him to enter into recognizances to the Master of the Rolls and Master in Chancery.

Security must  
be satisfactory  
to Sheriff.

It is to be observed, that the Sheriff is directed by the writ, to cause the defendant to give *sufficient* bail, or security, not to go, or attempt to go, beyond seas, &c. He is, therefore, not bound to take any security but what he may be satisfied is likely to prove effective. Thus, where the writ was marked in the sum of 36,000*l.*, and the defendant, after he was taken into custody, tendered to the Sheriff, as a security, the bond of himself and two sureties, in the sum of 36,000*l.*, and a deposit of that sum in the Bank of England, in the joint names of the Sheriff and sureties, which the Sheriff refused to accept; and although he afterwards proposed to release the defendant out of custody, upon his finding four sureties, in 36,000*l.* each, yet he ultimately insisted that the 36,000*l.* should be paid into his hands, before the defendant was discharged, Lord Eldon held, that the Sheriff was right in the course he had pursued; “for whatever the Sheriff does, under a writ of *ne exeat regno*, is upon his own responsibility (*1*), and what

(*n*) 1 Turn. & V. 990.

(*o*) Ibid.

(*p*) Prac. Reg. 291; Hinde, 612.

bond to be executed by the defendant, on a writ of *ne exeat* being served on him, set out in *Cox v. Scott*, 5 Harr. & John. 334.

(1) See *Brayton v. Smith*, 6 Paige, 439.

The obligations devolved upon sureties entering into a bond conditioned to obey such a writ, bear a close resemblance to the duties and responsibilities of bail at common law. They undertake that the defendant shall be responsible for the performance of the orders and decrees of the Court. *Johnson v. Clendenin*, 5 Gill & John. 463. And where the defendant in a writ of *ne exeat* has been proceeded against and committed to jail for not

done, was merely to require a sufficient security for his Application for discharge. the defendant to produce" (q).  
 this it appears that, instead of bail, the Sheriff may take Sheriff may take a deposit of the amount indorsed upon the writ (r). of the amount indorsed.  
 Sheriff, after he has executed the writ, ought to return it, Return of writ.  
 upon it a proper return of what he has done. If he has  
 not, it may be in the following form: — "*I have caused the*  
*named A. B. personally to come before me, and he found bail*  
*in the sum of £——, according to the command of this writ*" (s).  
 Also, if, instead of taking security according to the direc-  
 tion of the writ, he takes a deposit of the amount indorsed on the  
 writ, he should make a return to that effect; and it appears, that  
 if the Sheriff omitted to do so, the Lord Chancellor ordered  
 him to make his return within a given time (t).

#### SECTION IV.

##### *In what Manner discharged.*

as the party has been taken upon the writ, and given secu- Consequence of defendant going abroad before discharge.  
 rity, he must be careful not to go abroad, without previously ap-  
 plying to the Court to discharge it, otherwise the Court, it seems,  
 will require the sureties to pay the money into Court within a cer-  
 tain time, although the defendant's going abroad was the conse-  
 quence of a mistake as to the effect of the bond (u).  
 If an application to discharge the writ is made by motion; if Application for discharge, how made.  
 notice has been given, the notice of motion should state that  
 an application will be made as well for the discharge of the writ, as  
 for the bond may be given up to be cancelled (1).

*Sham v. Wood*, T. & R. 340. (t) *Bonner v. Worthington*, Reg.  
*lib. A. 1819*, fo. 233; cited *Beames*  
*ubi supra*. *ne ex. 97*.  
*pey, Office of Sheriff*, ed. (u) *Musgrave v. Medex*, 1 Mer.  
 49; *Utten v. Utten*, ib. 51.

g with a final decree of the Court, in the cause, and afterwards  
 from custody, his sureties upon the *ne exeat* bond are not responsible,  
 Court, as respects them, may order the bond to be cancelled. Ib.  
 e giving the usual security to the sheriff upon a *ne exeat*, does not  
 the defendant from applying upon the bill only, or upon the com-  
 the answer to have the writ discharged and the bond to the sheriff  
 and cancelled. *Jesup v. Hill*, 7 Paige, 95. The motion should be  
 without unreasonable delay. And accordingly, where an application  
 for a *ne exeat* was not made until after the cause had been noticed  
 for hearing, it was refused. *Miller v. Miller*, 1 Saxton Ch. (N. J.)



Application  
for discharge.

In what cases  
made before  
answer.

But in general  
not till after  
answer.

For Irregular-  
ity.

Upon merits.

If the application is upon the ground that the writ has been irregularly or improperly granted, it may be made before answer, and may be supported by affidavit (x).

In ordinary cases, however, it seems that the defendant is bound, without subpœna, to appear, and having appeared, he must put in his answer before he can apply to discharge the writ; and cannot be heard upon affidavit, unless the writ was issued upon matter arising after the answer had been put in, in which case he may support his application by affidavit (y) (1).

If, upon an application to discharge or quash the writ on the ground of irregularity, the Court thinks that it has been improperly issued, it will at once order it to be discharged. It will not, however, discharge the writ, merely because it appears to have issued for a sum exceeding that for which it can be sustained; but, in such cases, the amount for which it has been marked, will be reduced (z). Nor will it discharge a writ of this nature, obtained upon affidavits substantiating declarations and acts of the defendant as evidence of his intention to go abroad, upon a counter-affidavit by the defendant denying the intention (a). In *Jones v. Alephsin* (b), also, the Court refused to quash the writ upon the defendant's affidavit that no debt was due, and that the plaintiff had made admission to that effect, the plaintiff having, by his affidavit, sworn positively to there being a debt.

The Court will discharge the writ upon merits, whenever it appears, by the circumstances of the case, as disclosed by the affidavits upon which it was granted and the answer of the defendant, either that the plaintiff has no case, or that the defendant is not going out of the jurisdiction (c), and this it will do either absolutely or conditionally, i. e. upon the defendant's giving security to abide and perform the decree of the Court; for which purpose it

(x) *Grant v. Grant*, 3 Russ, 598; et vide *Hyde v. Whitfield*, 19 Ves. 342; *Flack v. Holm*, 1 J. & W. 414.

(y) *Russell v. Asby*, 5 Ves. 98; *Boehm v. Wood*, T. & R. 332; vide etiam, 15 Vin. Ab. p. 539, tit. *Ne exeat regnum*, pl. 6.

(z) *Grant v. Grant*, 3 Russ. 599.

(a) *Amainck v. Barklay*, 8 Ves. 594.

(b) 16 Ves. 470.

(c) *Leo v. Lambert*, 3 Russ. 417.

(1) Affidavits may be read both in support of and against the motion to discharge the writ. *Flack v. Holm*, 1 Jac. & Walk. 414; 1 Hoff. Ch. Pr. 363. And it is open to the defendant by affidavit to deny the allegations on which it was granted. *O'Connor v. Debraine*, 3 Edw. 230; *Cowdin v. Cram*, 3 Edw. 231.

ill refer it to the Master to approve of the proper security (d) (1).  
The Court will, also, discharge a *ne exeat regno*, upon the defendant's paying into Court the sum for which the writ is marked (e) (2).

Application for discharge.

Upon payment into Court.

When to be made.

It may be observed here, that the order directing the writ to issue, generally directs that the defendant shall be restrained from going abroad, until answer and *further order*; the Court, therefore, will not discharge the writ merely upon the coming in of the answer, if it appears, upon the merits of the case, that there will necessarily be decreed things for the defendant to do at the hearing (f).

It has also been decided, that a surety on a writ of *ne exeat regno* will not be discharged upon the principal's putting in his answer, or even upon such principal being, by a subsequent process of the Court, committed to prison, the Court observing, that the surety is then in no danger (g). In a recent case the sureties applied to be discharged, on the ground that the defendant was in custody without warrant of an answer; but Lord C. Eldon refused to discharge them, observing, that there was no instance of it; on the contrary, that in a late case, the Court had refused to discharge them (h).

On behalf of surety.

Not granted before decree.

The applications in *Le Clea v. Trot*, and *Stapylton v. Peile*, were *previous to the decree*: but where, *after a decree* against the defendant for the same matter as that for which the writ of *ne exeat*

*Secus*, after decree.

d) *Roddam v. Hetherington*, 5 N. 91; *Boon v. Collingwood*, 1 N. 115; *Atkinson v. Leonard*, 3 N. C. C. 223.

e) *Evans v. Evans*, 1 Ves. J. 86; *Swart v. Graham*, 19 Ves. 314; *Ask v. Swinton*, 1 V. & B. 373.

f) *Atkinson v. Bedel*, 1 Dick. 98.

g) *Le Clea v. Trot*, Prec. in Ch.

h) In a MS. in Mr. Beames's possession, written by Sir George Carey, Master in Chancery, and author of the small volume of reports which goes under his name, there is the following passage:—"A bail in this writ, or in the Civil Law, is not dis-

charged upon bringing in the principal, as he is at Common Law. *Arche-pool contra Burrell*, Michas. 23 & 24 Eliz." But Tothill's note of *Arche-boll v. Burrell*, which seems to be the same case as Sir George Carey mentions under the name of *Arche-pool contra Burrell*, is simply in these words:—"A bail in this Court, or in the Civil Law, is discharged upon bringing in the principal, as he may at the Common Law."—Tothill, p. 17, and see *Griffith v. Griffith*, 2 Ves. 400.

(h) *Stapylton v. Peile*, 27 June, 1816, cited Beames's *ne ex. 84*.

1) In New York, it is a matter of course to discharge a *ne exeat* upon the defendant's giving security to answer the plaintiff's bill, where a discovery is necessary, and to render himself amenable to the process of the Court pending the litigation, and to such process as may be issued to compel a performance of the final decree. *M'Namara v. Dwyer*, 7 Paige, 239; *Mitchell v. Nash*, 2 Paige, 606; *Gleason v. Bisby*, 1 Clarke, 551. See *Brayton v. With*, 6 Paige, 489.

2) In *Gibert v. Colt*, 1 Hopk. 501, the defendant brought the amount for which the writ was marked into Court, and the writ and bond were discharged by consent.

Application  
for Discharge.

*regno* issued, the defendant being in contempt, and in custody <sup>for</sup> not performing the decree, the sureties applied for that purpose, they obtained an order that they should be discharged, and ~~the~~ bond as to them cancelled (i).

In the case of *Baker v. Jefferies* (k), the Court discharged the recognizance entered into by the defendant and her two sureties, on a writ of *ne exeat regno*, for 2000*l.*, on the ground that the defendant had paid the 2000*l.* to the plaintiff, notwithstanding it appeared by the Master's report, that much more than the 2000*l.* was due from the defendant to the plaintiff (l).

When an application is made to discharge the writ of *ne exeat regno*, if the motion is granted, an order ought also to be applied for restraining the person against whom the writ has issued from bringing an action for false imprisonment. Otherwise, in the event of such an action being brought, although probably in all cases the Court would stop the action, yet the costs of the application for that purpose would be at the expense of the person by whom this writ had been obtained (m).

Effect of  
amendment of  
bill.

It may be noticed here, that the Court will not discharge a *ne exeat regno* on the mere ground that, since the writ was ordered the plaintiff has amended his bill, unless it can be shown, that the amendments have varied the case, as originally stated; the Court, therefore, will not make a special order giving the plaintiff liberty to amend, "without prejudice to the *ne exeat*," but will leave it to him to obtain the common order, if he thinks he can do so with safety (n).

(i) *Debazin v. Debazin*, 1 Dick. 95. The defendant, an executor, was, immediately after filing of the bill, arrested on the *ne exeat*. He gave security for 450*l.*; two persons of the names of *Randeau* and *Tonsey* being his bail to the sheriff upon the writ. Afterwards, a decree was pronounced in favor of the plaintiff, with costs. A writ of execution of the decree was issued, which was followed by an attachment for non-performance. On this attachment the defendant was arrested, and committed to the Fleet, "for the same matter for which the said *ne exeat* issued, as appears by the certificate of the Warden of

the Fleet." The sureties, *Randeau* and *Tonsey*, applied to be discharged, &c. and an order was pronounced, "that the said *Randeau* and *Tonsey*, the defendant's two sureties, who entered into the said bail bond for the defendant *Debazin*, on the said writ of *ne exeat*, be discharged, and that the said bond as to them be cancelled," *Debazin v. Debazin*, Reg. Ed. 1743, fo. 64.

(k) 2 Cox, 226.

(l) *Beames's ne ex.* 86.

(m) *Darley v. Nicholson*, 2 Dr. & W. 86.

(n) *Grant v. Grant*, 5 Russ. 189.

## CHAPTER XXXVIII.

## OF RECEIVERS.

SECT. I. — *In what Cases appointed.*

RECEIVER is an indifferent person, between the parties, appointed by the Court to receive the rents, issues, and profits of any other thing in question, in this Court, pending the suit, if it does not seem reasonable to the Court that either party should do it (1) : or when a party is incompetent to do so, as in the case of an infant. He is to account for such receipt when the Court shall require him, and, to secure his doing so, he is commanded to enter into a recognizance, with sureties (a).

Nature of the Office.

The appointment of a Receiver is a matter resting in the discretion of the Court (b) (2) ; and the Receiver, when appointed, is considered as virtually an officer and representative of the Court, subject to its orders (c) (3). Lord Hardwicke considered this mode of appointment to be of great importance and most beneficial tendency, and said — “ It is a discretionary power exercised by the Court, with as great utility to the subject, as any authority which belongs to it ; and is provisional only for the more speedy management of a party’s estate (d), and securing it for the benefit of

Appointment of, discretionary in Court.

1. Reg. 355, 356 ; 2 Harr. Massarene, 2 B. & B. 55 ; Jeremy on  
 1. 499. Eq. Jur. 248, 249.  
 2. Skip v. Harwood, 3 Atk. 564. (d) Skip v. Harwood, 3 Atk. 564 ;  
 3. Angel v. Smith, 9 Ves. 338 Story’s Comment. ch. 21, pl. 831.  
 4. [2d ed. notes] ; Hutchinson v.

wards, Receivers, 2 ; H. K. Chase’s case, 1 Bland, 213.

5. Verplank v. Caines, 1 John. Ch. 57.

6. In Asylum v. M’Cartee, 1 Hopk. 435, the Court remark, “ It is the appointing of a receiver rests in discretion. This proposition teaches much. A receiver is proper if the fund is in danger ; and this reconciles the cases found in the books. There is no case in which the Court appoints a receiver, merely because the measure can do no harm.”  
 7. Williamson v. Wilson, 1 Bland, 421. He is at all times entitled to receive its advice and protection. Cammack v. Johnson, 1 Bland, 163, 173. See Matter of the Receivers of the Globe Ins. Co. 102.

In Claims arising out of equitable interests.

Cases in which usually granted.

Where parties interested have equitable interests, the rights of party having the legal estate will be respected.

— as in the case of second mortgagee;

— or other equitable incumbrancers;

such persons who shall appear to be entitled, and does not at all affect the right" (1).

The most ordinary cases in which Receivers are granted by the Court, are those in which the suit arises out of claims by parties having equitable interests in the subject; in such cases the Court will appoint a Receiver, for the purpose of protecting the property till the question between the parties shall have been determined. And, in general, it may be taken as a rule, that where the legal estate is vested in an individual claiming an interest paramount to that of the litigant parties, so that the litigant parties can only have equitable interest, the Court will grant a Receiver, although, in doing so, it will always take care not to interfere with the rights of the party having the prior estate: therefore where a man has an equitable mortgage, "that is, if there is a prior mortgage, then, if the prior mortgagee is not in possession, the other may have a Receiver, without prejudice to his taking possession (e)." In *Burney v. Sewell* (f), Lord Eldon says, "I remember a case, where it was much discussed, whether the Court would appoint a Receiver, where it appeared by the bill, that there was a prior mortgage who was not in possession: I have a note of that case; there Lord Thurlow made the appointment, without prejudice to the first mortgagee taking possession, and that was afterwards followed by Lord Kenyon" (g).

The same principle is applied to other equitable creditors (h), and indeed to all other persons having mere equitable estates. The rule, with respect to equitable creditors, is thus laid down by

(e) 1 J. & W. 648.

(f) 1 J. & W. 649.

(g) In *Phipps v. The Bishop of Bath & Wells*, as reported in 2 Dick. 608, Lord Thurlow refused the appointment of a Receiver at the instance of a second mortgagee, the first not being in possession; but in *Bryan v. Cormick*, 1 Cox, 423, he came to the determination mentioned above; a similar order was made in

*Dalmar v. Dashwood*, 2 Cox, 378. In *Norway v. Rowe*, 19 Ves. 153, the Lord Chancellor states it to be the practice, on motions for Receivers, not to look at mortgagees further than to take care that they are not prejudiced, see *Price v. Williams*, Coop. 31, and *Brooks v. Greathed*, 1 J. & W. 176.

(h) Vide *Curling v. Marquis Townshend*, 19 Ves. 623.

(1) Though the appointment of a receiver does not involve a decision upon any right, still it can only be made at the instance of a party who has an acknowledged interest or a strong presumption of title in himself alone, or in common with others; and where the property itself, or its rents and profits, are in danger of being materially injured, or totally lost. *H. K. Chase's case*, 1 Bland, 213; *Williamson v. Wilson*, ib. 421.

But the appointment of a receiver alters no right, not even so as to prevent the running of the statute of limitations. *Williamson v. Wilson*, 1 Bland, 421.

To authorize the appointment of a receiver in a suit in Chancery, the bill must lay a foundation for it, by stating the facts which show its necessity or propriety. *Tomlinson v. Ward*, 2 Conn. 396.

Lord Eldon in *Davis v. The Duke of Marlborough* (i) — “The rule, I take to be, that the Court will, on motion, appoint a Receiver for an equitable creditor, or a person having an equitable estate, without prejudice to persons who have prior legal estates; in this sense, without prejudice to persons having prior legal estates, that it will not prevent their proceeding to obtain possession, if they think proper (k); and with regard to persons having prior equitable estates, the Court takes care, in appointing a Receiver, not to disturb prior equities; and, for that purpose, directs inquiries, to determine priorities among equitable incumbrancers, permitting legal creditors to act as against the estates at Law, and settling the priorities of equitable incumbrancers. Provided it is satisfied, in that stage of the cause, that the relief prayed by the bill will be given when the decree is pronounced, the Court will not expose parties claiming that relief to the danger of losing the rents, by not appointing a Receiver of an estate, on which it is admitted that they cannot enter (l).” And here it may be remarked, that although, where there is a prior mortgagee in existence having the legal estate, the Court will not, by the appointment of a Receiver, deprive him of his right to possession, the Court will not permit him to object to the appointment of a Receiver by any act short of a personal assertion of his legal right, and taking possession himself (m). And if, after a Receiver has been appointed, he does not think proper to avail himself of his legal right, (which he may do by applying to be examined *pro interesse suo*), he will not be permitted to have the benefit of the Receiver (n), — the appointment of a Receiver being for the benefit of incumbrancers, so far, only, as expressed to be for their benefit, and as they choose to avail themselves of it (o).

In the Case of Mortgagees &c.

in which case it will be without prejudice to prior legal estates.

Prior incumbrancer cannot object except by taking possession himself.

Receiver only for benefit of those who choose to avail themselves of it.

(i) 2 Swanst. 108, 137.

(k) Vide *Dalmar v. Dashwood*, 2 Cox, 382, but they must first obtain leave of the Court, *Bryan v. Cormick*, 1 Cox, 422; *Anon.* 6 Ves. 287; *Angel v. Smith*, 9 Ves. 335; *Brooks v. Greathed*, 1 J. & W. 176; *Gresley v. Adderley*, 1 Swanst. 579, et vide post.

(l) It seems to have been considered, by the reporter in *Price v. Williams*, (Coop. 31,) that Sir Thomas Plumer's opinion was, that if it appears by the pleadings, that there is a prior mortgage, the Court will not appoint a Receiver unless the mortgagee is a party to the suit, which would have been at variance with the

general practice of the Court — Sir Thomas Plumer's objection to the appointment, in that case, must, therefore, have been founded in the fact that the mortgagee was also a *cestui que trust* under the will, in which character he was a necessary party, though in the mere character of mortgagee he was not so.

(m) *Silver v. The Bishop of Norwich*, 3 Swanst. 112, n. 115.

(n) Vide *Anon.* 6 Ves. 287; *Angel v. Smith*, 9 Ves. 336; *Brooks v. Greathed*, 1 J. & W. 178; *Hunt v. Priest*, 2 Dick. 540.

(o) *Gresley v. Adderley*, 1 Swanst. 579.

In the Case of  
Mortgagees,  
&c.

Although party creating  
incumbrance  
be abroad.

Or has absconded to  
avoid service.

No Receiver  
appointed  
against the  
possession of  
party having  
a prior legal  
estate.

It may be mentioned here, that the Court will grant a Receiver at the instance of a second incumbrancer, in all cases in which the first incumbrancer is not in possession of the property, and that the circumstance of the party creating the incumbrance being abroad, and refusing to appear to the suit, will not deprive the mortgagee of his right to possession (*p*). In *Holmes v. Bell* (*q*), however, Lord Langdale, M. R., appears to have entertained some doubt as to his power to appoint a Receiver, where one of two mortgagees, who were tenants in common, was abroad, at least so far as regarded the moiety of the absent party, although he thought the objection removed by the circumstance of the mortgagee, who was in England, being in the possession of the whole estate. His Lordship's difficulty appears to have arisen from *Browne v. Blount* (*r*), in which the Master of the Rolls, Sir J. Leach, refused to appoint a Receiver in the absence of the owner of the estate; but it is to be observed, that the determination, in that case, was not come to upon an interlocutory application, but upon the hearing of the cause; on which occasion, it having been concluded that the Court could not proceed to make a decree in the absence of the party beneficially interested, it was urged that, although it could not grant the relief prayed, it would go the length of appointing a Receiver.

It may be mentioned here, that, in a recent case, the V. C. of England appears to have granted a Receiver against a defendant who was out of the jurisdiction of the Court (*s*). And that in *Pitcher v. Helliard* (*t*), a Receiver was appointed upon affidavit that the defendant had absconded to avoid being served with a subpoena.

But although the Court will, in general, grant a Receiver, at the instance of a party having an equitable estate, when the individual having a prior legal estate is not in possession, it will not unless under very particular circumstances, appoint one where the party

(*p*) *Tanfield v. Irvine*, 2 Russ. 149, sed vide et quare *Coward v. Chadwick*, *ibid.* p. 150, n.

(*q*) 2 Beav. 298.

(*r*) 2 R. & M. 83.

(*s*) *Gibbins v. Mainwaring*, 9 Sim. 77.

(*t*) 2 Dick. 580; vide etiam, *Maquire v. Allen*, 1 B. & B. 75.

aying the legal estate is in actual possession of the property (u). Thus although a second mortgagee may have a Receiver, where he first is not in possession, yet if the first mortgagee is in actual possession of the estate, a Receiver will not be appointed unless indeed it is shown that the first mortgagee has been paid off, in which case a Receiver may be appointed on the application of a subsequent incumbrancer (z).

*In the Case of Mortgagees, &c.*

It is to be understood, that, in order to defeat an equitable mortgagee of his right to a Receiver, the possession of the party must be such a possession as invests him with a title to receive the rents and profits; a mere possession as tenant will not be sufficient; and where one of the defendants, who was in the occupation of part of the estate as tenant, and had purchased of the plaintiff a part of his mortgage, the interest of which was about equal to the rent of his occupation, the Court of Exchequer held that he could not unite his two characters of mortgagee and tenant, and that his possession, being as tenant, could not be set up against the other mortgagee (y) (1).

*But possession must be such as to entitle party to rents and profits.*

And here it may be remarked, that as between mortgagees in possession and persons having subsequent interests, the Court will not appoint a Receiver against a mortgagee's own oath that something is due to him (z) (2), unless the party making the applica-

*Receiver not appointed against mortgagee's own oath that something is due.*

(u) It seems that this rule will not apply where the party in possession merely so upon execution, under judgment, and that, in such cases, a creditor having taken out execution, cannot hold property against an estate created prior to his debt; vide *Swanst. 117*. Upon this principle Lord Eldon made an order for the appointment of a Receiver of the rents and profits of a rectory, at the instance of a second incumbrancer, although a third incumbrancer was in possession under a sequestration from the Bishop, which his Lordship considered, in contemplation of this Court, as equal to a judgment, *White*

*v. Bishop of Peterborough*, 3 *Swanst.* 109. As between equitable creditors and judgment creditors, having possession under writs of *elegit*, it is competent to the Court to appoint a Receiver in favor of the equitable creditors, not disturbing the just rights of any of the judgment creditors in possession; *Davis v. Duke of Marlborough*, 1 *Swanst.* 74.

(x) Vide *Quarrell v. Beckford*, 13 *Ves.* 377; *Codrington v. Parker*, 16 *Ves.* 469; *Berney v. Sewell*, 1 *J. & W.* 647.

(y) *Archdeacon v. Bowes*, 3 *Anst.* 752.

(z) *Rowe v. Wood*, 2 *J. & W.* 553.

(1) See *Sea Ins. Co. v. Stebbins*, 8 *Paige*, 565; *Bank of Ogdensburg v. Arnold*, 5 *ib.* 38; *Frelinghuysen v. Colden*, 4 *Paige*, 204.

(2) See cases in above note; *Quinn v. Brittain*, 3 *Edw.* 314; *Seaby v. Arthur*, 1 *Hogan*, 92.

Receivers in mortgage cases are allowed with great caution; and will be appointed only where there is a clear inadequacy of security, or the rents have been expressly pledged for the debt. The best criterion of adequacy, or inadequacy of the security in such cases, is the rental. *Shotwell v. Smith*, 3 *Edw.* 588.



In the Case of  
Mortgages  
etc.

When mortga-  
gee refuses to  
accept what is  
due.

Mortgagee  
paid off, gives  
security to re-  
fund.

In what cases  
Court will  
grant Receiver  
against legal  
estate.

At the instance  
of a purchaser  
*pendente lite*;

— or pend-  
ing a suit to  
enforce an  
agreement for  
a mortgage.

tion will offer to pay him off, according to his demand, as he states it himself; in which case, if the party will bring the mortgagee's own confession, that he has been paid off, or that he has refused to accept what is due to him, the Receiver will be appointed (a).

For this purpose the Court will require the mortgagee to state upon his oath what he believes to be due; and in taking the possession from him upon payment of what he swears to be due, will make him give security to refund, if it shall appear, upon the account, that so much is not due; and where he will not swear that any thing is due, the Court will appoint a Receiver (b).

It is to be observed, that the disinclination of the Court to appoint a Receiver, where the property is in possession of a party having the legal estate, is felt in those cases only in which the estate of the party in possession is prior to that of the party in the litigation; where the right to the possession is the subject of dispute, and the plaintiff having an equitable interest claims the legal estate from the defendant in possession, there the Court will, if it sees clearly that the plaintiff has the right, and that the ultimate decree will be in his favor, appoint a Receiver pending the suit.

This was done in *Metcalf v. Pulvertoft* (c), at the instance of a purchaser *pendente lite*, the Court being satisfied that the contract was one which it could enforce.

So, also, where the defendant, on an advance of money by the plaintiff, agreed to execute a mortgage of certain lands, but did not perform the agreement, and there was an arrear of interest due on the money advanced, upon which the plaintiff filed a bill for a specific performance, Sir J. Leach, V. C., appointed a Receiver (d).

In like manner, where a tenant in tail in remainder, upon an advance of money to him by the plaintiff, had agreed to repay it after the death and failure of issue of his brother, the tenant in tail in possession, and had secured the money by a mortgage of the estate, and a covenant to levy a fine and suffer a recovery to give effect to the mortgage, but, on coming into possession of the estate, refused to perform his covenant, the Court appointed a Receiver of the rents (e).

Upon the same principle, where a bill was filed by creditors claiming satisfaction out of real and personal assets, and it appeared, by the answer of the person in possession of the real es-

(a) *Berney v. Sewell*, 1 J. & W. 746.

(b) *Chambers v. Goldwin*, cited 13 Ves. 377; *Quarrell v. Beckford*, ib.

(c) 1 V. & B.

(d) *Shakel v. Duke of Marlboro'*, 4 Mad. 463.

(e) *Free v. Hinde*, 2 Sim. 7.

, that the real estate must eventually be responsible, as there is no personal estate to be applied to discharge debts, the Court appointed a Receiver in the first instance (*f*) (1).  
 The Court will also appoint a Receiver against a party having possession under a legal title, if it can be satisfied that such party is wrongfully entitled to such legal estate. Thus where fraud can be clearly proved and immediate danger is likely to result if the intermediate possession should not be taken under the care of the Court, a Receiver will be appointed (*g*). This rule was recognized by Lord Eldon in *Lloyd v. Passingham* (*h*). "The Court exercises, observes his Lordship, "by appointing a Receiver, with great reluctance; compelled by judicial necessity, the effect of which is clearly proved, and immediate danger if the intermediate possession should not be taken under the care of the Court." In order, however, to induce the Court thus to interfere, it is, according to his Lordship's subsequent remarks, not only necessary that the Court should be satisfied of the existence of fraud, but it must be morally sure that, upon the hearing of the cause, the party would upon the circumstances be turned out of possession; and not only that, but it must see some danger to the intermediate trusts and profits (*i*). His Lordship, in that case, did not conceive that the circumstances disclosed, formed that extreme case in which the possession was to be taken from those who had the legal title; but in a more recent case *Stilwell v. Wilkins* (*k*), where a bill was filed for the purpose of setting aside a purchase, and the power of the defendants, who were the devisees of the purchaser, admitted the great inadequacy of the price, but stated their ignorance of the other circumstances of fraud alleged; his Lordship appointed the Receiver, because, "if the case stated were true, the inadequacy was so monstrous, and the situation of the young man in the state of his intellect were such, that it was hardly possible to suppose that the transaction could stand:" he thought, therefore, that it was a case in which such an order might be made,

Against the legal Estate.

Where Court is satisfied that party in possession is wrongfully entitled.

Where there has been great inadequacy of price.

*f*) *Jones v. Pugh*, 8 Ves. 71; *gal, Earl of, v. Blake*, 2 Moll. 52. *(i)* *Lloyd v. Passingham*, 16 Ves. 70; vide *Hugonin v. Baseley*, ubi supra.  
*g*) *Lloyd v. Passingham*, 16 Ves. 70; *Hugonin v. Baseley*, 13 Ves. 105 [anmer's ed. note]. *(k)* *Jac.* 280: vide 6 Mad. 41, S. C., sub nomine *Stilwell v. Williams*.  
*h*) Ubi supra.

1) As to receivers in creditor's suits, see *Bloodgood v. Clark*, 4 Paige, 1; *Browning v. Bettis*, 8 Paige, 568; *Fitzhugh v. Everingham*, 6 Paige, 1; *Osborn v. Hoyer*, 2 Paige, 342; *Haggarty v. Pittman*, 1 Paige, 298; *ker v. Moore*, 3 Edw. 234; *Congden v. Lee*, ib. 304; *Hart v. Tims*, 3 w. 226.

In the Case of Executors, &c Court. though it was not in accordance with the general habit of the Court.

Where there is an implied trust.

Upon the same principle, the Court interfered in *Podmore Gunning (l)*. In that case a testator, by his will, bequeathed the residue of his real and personal estate to his wife, "having perfect confidence that she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease," and, upon the wife's dying without a will, the Court appointed a Receiver, upon an allegation in the bill, (supported by affidavit,) of a promise by the wife to her husband, on the faith of which he had made his will, that she would bequeath the residue of his property, after her decease, to the plaintiffs, who were his natural children.

It is to be observed that, in the above cases, there were circumstances of either actual or constructive fraud, as well as of actual title, to induce the Court to interfere; where these circumstances are absent, and there is no case of spoliation, the Court will not appoint a Receiver upon mere ground of title in the plaintiff(s).

Wherever there is danger to the estate.

In the case of executors or administrators,

But although the Court will not interfere upon the mere ground of title, it will appoint a Receiver at the instance of parties beneficially interested, even where there is no fraud or spoliation, provided it can be satisfactorily established that there is danger to the estate or fund, unless such a step is taken (1). Thus, in the case of executors, if the executor has wasted the effects, or in other respects misconducted himself, the Court will interfere by the appointment of a Receiver (n) (2); upon this ground, also, where an executor has not done what he can to get in the personal estate, the Court will order a Receiver to be appointed (o) (3).

(l) 5 Sim. 485.

(m) *Toldervy v. Colt*, 1 Y. & C. Exch. Rep. 621.

(n) *Anon.* 12 Ves. 5; *Middleton v. Dodswell*, 13 Ves. 26 [Sumner's

ed. note (a)]; vide etiam, *Haven v. Havers*, Barnadist. 22.

(o) *Richards v. Perkins*, 3 Y. & C. Exch. Rep. 299.

(1) Wherever the appointment of a receiver is sought against an executor or administrator, it is necessary to establish by suitable proofs, that there is some positive loss, or danger of loss of the funds; as for instance, some waste or misapplication of the funds, or some apprehended danger from the bankruptcy, insolvency, or personal fraud, misconduct, or negligence of the executor or administrator. 2 Story Eq. Jur. § 836; *Mandeville v. Mandeville*, 8 Paige, 475; *Orphan Asylum v. M'Cartee*, 1 Hopk. 435. The fact, that a trustee mixes the trust fund with his own is not a sufficient ground for the appointment of a receiver. *Orphan Asylum v. M'Cartee*, 1 Hopk. 435.

(2) *Boyd v. Murry*, 3 John. Ch. 48.

(3) Not, however, where the executor is admitted to be solvent, and the fund is in no danger. *Tennent v. Tennent*, 1 Craw. & Dix, 241.

But although a Receiver will be appointed as against an executor, where it is shown that there is a probability of danger to the party, it must be such danger as arises from the misconduct or neglect of the party, — mere poverty will not, of itself, constitute sufficient ground for such an appointment (*p*). Where, however, an executrix, who had been appointed guardian of her three children, by her husband, married a second husband in necessitous circumstances, the House of Lords directed a Receiver to be appointed to get in the outstanding personal estate (*q*). And where the husband of a woman, who had been appointed executrix, was in the West Indies, and was sworn to be in indifferent circumstances, a Receiver was also appointed (*r*). It appears, however, from report of that case, as if a principal ground for granting the Receiver had been the fact of the husband being in the West Indies, and not amenable to the process of the Court; but, in a recent case of a similar nature, the Court of Exchequer made the order, upon the proof of the husband's insolvency, though the affidavit positively denied the fact of his being abroad (*s*). In general, it may be assumed that, in a case where a personal representative is actually insolvent, a Receiver will be appointed (*t*); therefore, if an executor has become bankrupt, or taken the benefit of the Act for the Relief of Insolvent Debtors, the Court will appoint a Receiver; and if it should be necessary to bring actions at Law to recover part of the effects, since they must be in the name of the executor, the Court will compel him to allow his name to be used (*t*). It seems, however, to be doubtful, whether, if a person, known by a testator to be a bankrupt or insolvent, be appointed an executor by his will, such person can be controlled by the appointment of a Receiver (*u*); but it is not to be inferred, from the circumstances of the will having been made some time before the commission issued, and not afterwards, that the testator had a deliberate intention to intrust the management of his estate to an insolvent executor (*x*).

In the Case of Executors, &c.

— arising from misconduct or neglect, — but not from poverty.

Unless in the instance of the husband of an executrix.

Or where executor is actually insolvent.

*p*) *Hathornthwaite v. Russell*, 2 Bro. C. 126; *Howard v. Papera*, 1 Mad. C. 269, S. C. [Perkins's ed. 277, Anon. 12 Ves. 4. notes]; *Scott v. Becher*, ubi supra.  
*q*) *Dillon v. Lady Mount Cashell*, 1 P. C. ed Toml. 300–12. (*u*) *Gladdon v. Stoneman*, 1 Mad. 143, n.; *Langley v. Hawk*, 5 Mad. 46.  
*r*) *Taylor v. Allen*, 2 Atk. 213. (*x*) *Ibid.* Williams on Executors, 46.  
*s*) *Scott v. Becher*, 4 Pri. 346. (ed. 3.) vol. 1, p. 169.  
*t*) *Utterson v. Mair*, 2 Ves. J. 95

*Where an executor has removed from the State, leaving his cestui que and the trust estate, the Court will on the application of the cestui que appoint a receiver. Ex parte Galluchat*, 1 Hill Ch. 150. But the Court has power to substitute one executor in the place of another. *Ib.*

In the Case of  
Executors,  
&c.

It is to be mentioned here, that, in a recent case, the Court of Exchequer held, that the circumstance that the party who had the administration of the testator's effects, was an uncertificated bankrupt, and was not appointed to the office by the testator, was not a sufficient ground for the appointment of a Receiver *before answer*, where several of the parties interested had refused to join in the application (y).

In the case of  
trustees,

The same grounds which will induce the Court to take away from an executor the possession, or the right to the possession, of the testator's property, by the appointment of a Receiver, in case of his misconduct or of his bankruptcy or insolvency, will induce the Court to interfere in the case of any party clothed with the character of a trustee, and that whether he is a mere trustee or a trustee having an interest in the estate or fund (1).

— where  
they refuse to  
act,

Thus where a trustee refuses to act, the Court will, on the application of the persons beneficially interested, appoint a Receiver (z); and so where several trustees under a settlement, in consequence of disputes among themselves, permitted the rents of the trust estate to fall in arrear, the Court not only appointed a Receiver to collect the rents, but ordered the costs of the suit to be paid by the trustees (a).

— or have  
committed a  
clear breach of  
trust.

It may be observed, that, although the Court will, in general, where there has been a clear breach of trust on the part of a trustee, interfere to take the possession from him pending the suit in which the discussion of his conduct is involved, it will not, where property has been applied without complaint for a series of years, according to an uniform course of management which has been sanctioned by the parties beneficially interested, appoint a Receiver by interlocutory order, on the ground that such application of property is a breach of trust, unless it is perfectly clear that the party in whom the property is vested is a mere naked trustee, and has not, even to a limited extent, any of the rights and interests of an owner. Upon this ground, a motion for the appointment of a Re-

(y) *Smith v. Smith*, 2 Y. & C. Exch. Rep. 353.

(z) *Brodie v. Barry*, 3 Mer. 685.  
(a) *Wilson v. Wilson*, 2 Keen, 249.

(1) If an assignee becomes insolvent, the assignor may apply for the appointment of a receiver to execute the trust declared in the assignment. *Keys v. Bush*, 2 Paige, 211. So where a debtor in failing circumstances, assigns his property to a person, who is insolvent, in trust for his creditors, a receiver will be appointed, upon the application of such creditors, to take charge of such property so assigned. *Haggarty v. Pittman*, 1 Paige, 236.

ver of the estates vested in the Irish Society at the instance of <sup>In the Case of Trustees.</sup> Trustees, who claimed a beneficial interest in the income of the estates, was refused (b).

With reference to the effect of acquiescence on the part of those <sup>Effect of acquiescence by cestui que trust.</sup> beneficially interested, as a ground for the Court refraining from disturbing the possession by the appointment of a Receiver, it may be mentioned that the subject was much discussed in *Gray v. Bagnall* (c). In that case, the commissioners of a canal had made an agreement for letting the tolls, which was not warranted by the statute under which they derived their authority, and was prejudicial to an interest expressly reserved, by the Act, to the public; this agreement was acquiesced in without complaint by the shareholders for forty-seven years, during which period the lessee remained in undisturbed possession of the tolls, and, upon a suit instituted by some of the shareholders, on behalf of themselves and others, to set aside the agreement, and for a Receiver, Lord Eldon discharged an order for a Receiver of the tolls, which had been made by the Vice-Chancellor.

It is to be observed that, in cases of misconduct by trustees, <sup>Whether trustee is by appointment or by implication.</sup> whether by *misfeasance* or *nonfeasance*, the Court will appoint a Receiver, as well in cases in which the trust arises by implication, as in those where it is expressed. Upon this principle, the Court has held, that where a man takes a conveyance of a legal estate subject to equitable interests, he must satisfy those interests or submit to a Receiver; therefore, where a man purchased lands which were subject to two equitable annuities, which he refused to pay, Lord Eldon expressed his determination to appoint a Receiver, unless the defendant would enter into an undertaking to pay the annuities (d) (1).

Upon the same principle, if a tenant for life of leaseholds is <sup>Where tenant for life of leaseholds is bound to renew.</sup> bound to renew, he is, in such case, clothed with the character of a trustee; and if by his threats or acts he manifests an intention to let the lease to expire, the Court will appoint a Receiver in or-

*Skinnners' Company v. Irish* (d) *Pritchard v. Fleetwood*, 1 Mer. 54.  
*ty*, 1 M. & C. 162.  
*2 Russ.* 126.

Where land is charged with the payment of an annual sum, a receiver may be put upon it as a means of enforcing payment. *Owing's case*, 2 M. & C. 297. See *Cairnes v. Chabert*, 3 Edw. 312; *Rogers v. Ross*, 4 John. 86.

In the Case of  
Trustees.

— for the  
purpose of ac-  
cumulating a  
fund.

der to provide a fund for renewal (e); and if a tenant for life has already allowed the period of renewal to pass, the rents and profits will be sequestered either for procuring a renewal or finding the remainder-man a compensation (f).

Upon the same ground, the Court of Chancery in Ireland has appointed a Receiver to provide a fund for the payment of the interest and costs due to a purchaser, who had been discharged on a report that a good title could not be made, and there was no find in Court out of which such interest and costs could be paid (g).

It may be mentioned here, that a similar order for the appointment of a Receiver of the rents and profits of an estate, for the purpose of accumulating a fund, was made by the V. C. of England, in a recent case where the party had fraudulently obtained a sum of money, to which the trustees of her settlement were entitled (h). The circumstances of the case are very peculiar, and are shortly as follows: on the marriage of Sir Nigel and Lady Gresley, certain estates of which she was seised, together with her interest in a sum of 2609*l.* Old South-Sea Annuities standing in the name of the Accountant-general, in a cause of *Ross v. Berrow*, to which the lady was entitled in reversion, expectant on the death of her mother and aunt, were conveyed to trustees, in trust for Lady Gresley for life, with remainder in trust for the younger children of the marriage; and, by another deed, Sir Nigel Gresley granted, out of his own estates, a rent-charge of 800*l.* to Lady G., for her life. After Sir Nigel Gresley's death, Lady Gresley, unknown to the trustees of her settlement, obtained an order in the cause of *Ross v. Berrow*, (her mother and aunt being both dead,) for the transfer of the 2609*l.* South-Sea Annuities to herself, and she afterwards assigned her life interest in her own estates, and in the rent-charge of 800*l.* over Sir Nigel's estates, to her son Sir Roger Gresley, as a security for 5000*l.* which he had advanced on her account. Upon the fraud committed by Lady G. being discovered, a bill was filed by the parties entitled, under the settlement, to the 2609*l.* South-Sea Annuities and to the rents of Lady Gresley's estate, asking for a declaration that the obtaining of the 2609*l.* stock, by Lady Gresley, was a fraud upon her marriage settlement, and that she was therefore not entitled to

(e) Vide *Bennett v. Colley*, 2 M. & K. 225, 233, and 5 Sim. 192, S. C.

(f) Vide *Lord Montfort v. Lord Cadogan*, 17 Ves. 485.

(g) *Hill v. Kirwan*, 1 Hog. 165. The usual course, however, in such

cases is to order the costs to be paid by the plaintiff, without reference to the question, how they are to be ultimately satisfied.

(h) *Woodyatt v. Gresley*, 8 Sim. 180.

ceive the rents of the estates comprised in the settlement, or to receive the rent-charge of 800*l.* granted out of the estates of Sir Nigel Gresley, and that these rents and the rent-charge had become immediately applicable to replace the stock, and praying that the assignment to Sir Roger Gresley might be postponed to the right of the plaintiffs to have the rents and profits and rent-charge applied in the manner stated: and upon a motion being made before answer, for an injunction and Receiver, which was supported by affidavits showing that before the assignment to him, Sir Roger Gresley had notice of the fraud which had been committed by his mother, the Vice-Chancellor held that the Court was called on not to interfere, as soon as it could, to have the fund which Lady Gresley had abstracted restored, and granted the motion.

*In the Case of Trustees.*

As the object of appointing a Receiver is, usually, the preservation and protection of the property in dispute pending a litigation, the Court will not appoint a Receiver on the application of a party who possesses the power of protecting the property without it; consequently, a Receiver will not be appointed on behalf of a mortgagor who has the legal estate, as he has nothing to do but to take possession (i).

Receiver not appointed where party making the application has the legal right,

So, also, where one of the plaintiffs was a trustee of the estate with a power of entry and distress, Lord Eldon discharged an order appointing a Receiver (k); and it may be laid down as a rule, arising from the same principle, that wherever there is a dispute respecting an estate which depends upon a mere legal title, the Court will not, in general, grant a Receiver, because the plaintiff has his remedy by asserting his title in a Court of Law (l).

— or where legal right is in dispute,

Thus where an heir at Law disputes a will against the devisees in possession, the Court will refuse a Receiver, although there may be a dispute in the Ecclesiastical Court concerning probate; because he may, if he is entitled as heir, bring his ejectment against the devisees (m).

— as in the case of a dispute between heir at law and devisee.

This rule, however, is departed from where there are peculiar circumstances in the case, as where the Court sees that it is clear, from the evidence produced, that there is no ground to impeach Secus, where there are peculiar circumstances,

(i) *Berney v. Sewell*, 1 J. & W.

17.

(k) *Buxton v. Monkhouse*, Coop.

1.

(l) *Mordaunt v. Hopper*, Amb. 311.

(m) *Knight v. Duplessis*, 1 Ves.

325; *Fingal, Earl of, v. Blake*, 1 Mol.

158; 2 Moll. 50; vide etiam, *Lloyd*

*v. Trimleston*, 2 Moll. 81.



Pending a Litigation in another Court.

— or danger to the property.

A Receiver may be appointed by the Court of Chancery, notwithstanding an administration *pendente lite* may be also obtained.

the will, or the heir throws a doubt upon his own title by moving to postpone the trial (n).

So also a Receiver will be appointed where it is shown to be important that the Court should interfere for the protection of the estate or of the rents and profits. Thus where it can be established that there is danger of the interim rents being lost, from the refusal of a tenant to pay them, the Court will appoint a Receiver (o); but there must be a strong case shown of danger to the intermediate rents, there must be also a strong ground of title in the plaintiff (p).

The Court will likewise extend the application of the principle of providing for the safety of property pending a litigation, to cases where the litigation is in another Court; thus during a litigation in the Ecclesiastical Court for probate or administration, a Court of Equity will entertain a bill for the mere preservation of the property of the deceased, till the litigation is determined, and appoint a Receiver, although the Ecclesiastical Court, by granting an administration *pendente lite*, might provide for the collection of the effects (q). And a Court of Equity will appoint a Receiver, as well when the litigation in the Ecclesiastical Court is to recall administration or probate already granted, as in a case where no administration has been granted before the application to the Court of Chancery (r). But the mere circumstance that there has been a suit instituted in the Ecclesiastical Court to recall a probate already granted, does not give the Court of Chancery jurisdiction to interfere; for if that were so, it is evident that, in order to obtain a Receiver, it would be only necessary to institute a suit in the Ecclesiastical Court (s). The Court of Chancery, therefore, will look into the case, to see whether, on the whole, such a case is made as justifies its interference; and it should seem, that if it appears, from all the circumstances, that there is substantially a *lis pendens* in the Eccle-

(n) *Fingall v. Blake*, ubi supra. It is to be observed, that the evidence to satisfy the Court in such a case, must be that which is afforded by the answer or affidavits: the Court will not before hearing make an order for a Receiver upon the depositions in the cause. *Lloyd v. Passingham*, 3 Mer. 697.

(o) Ibid.

(p) *Mordaunt v. Hooper*, ubi supra.

(q) Lord Red. 135, 136; *King v. King*, 6 Ves. 172; *Edmunds v. Bird*, 1 V. & B. 542; *Atkinson v. Hen-*

*shaw*, 2 V. & B. 85; *Ball v. Oliver*, ibid. 96; *Watkins v. Brent*, 1 M. & C. 102, overruling the distinction taken by Lord Erskine, in *Richards v. Chave*, 12 Ves. 462.

(r) *Rutherford v. Douglas*, 1 S. & S. 111, n. (d); *Ball v. Oliver*, ubi supra.

(s) *Watkins v. Brent*, 1 M. & C. 97; see also, *Knights v. Duplessis*, 1 Ves. 324, and a MS. case argued on demurrer, 13th June, 1812, cited in 1 Mad. Chan. 225, n. 1, 2nd ed. Dew v. Clarke, 1 S. & S. 114.

siastical Court, a Receiver may be appointed notwithstanding there is no ground laid for the interference of the Court of Chancery in respect of any improper conduct of the parties (*t*). Pending a Litigation in another Court.

In *Jones v. Frost* (*u*), where a bill, for the appointment of a Receiver, merely alleged, that the Ecclesiastical Court had set aside, on the ground of fraud, a pretended will set up by the defendants, and that the defendants opposed the application which the plaintiffs were then making for letters of administration, without stating what were the grounds of opposition, a demurrer was allowed by Sir John Leach, V. C., because nothing appeared on the bill to show that the plaintiff might not, in due course, have obtained the administration. But in *Marr v. Littlewood* (*x*), Lord Cottenham granted a Receiver, at the instance of an executor, pending a suit in the Ecclesiastical Court to have the probate annulled; the defendant, who was the party impeaching the will and setting an intestacy, having by her own act prevented the executor from getting in the assets; and his Lordship observed, that in *Jones v. Frost* it did not sufficiently appear that there was a litigation pending in the Ecclesiastical Court, whereas, in the present case, unquestionably such a litigation was then depending between the parties; and it was solely by the act of the party prosecuting that litigation, that the legal power of the plaintiff had been rendered unavailing (*y*).

The Court will also grant a Receiver, pending an appeal to the Privy Council from a decision of the Ecclesiastical Court upon the validity of a will, there being no power in the Privy Council to protect the property pending the appeal (*z*). So, also, in *Wood v. Hitchins* (*a*), where the Ecclesiastical Court had by its sentence rejected the testamentary paper of the deceased and declared for an intestacy, whereupon the parties interested under the will appealed to the Privy Council, which inhibited the Ecclesiastical Court from proceeding, Lord Langdale, M. R., whose opinion was afterwards confirmed by Lord Cottenham (*b*), held, that the circumstance of there being no person authorized to protect and collect the estate, alone justified the appointment of a Receiver by this Court, even though the application was made by the party appellant, who, if the decision of the Ecclesiastical Court Pending an appeal to the Privy Council.

(*t*) 1 Williams on Exors. 389; Watkins v. Brent, 1 M. & C. 97. (z) Day v. Croft, Rolls, 9 Nov. 1828, cited 2 Beav. 293.  
(*u*) 3 Mad. 1; Jac. 466, S. C. (a) 2 Beav. 289.  
(*x*) 2 M. & C. 464. (b) Vide ibid. 298.  
(*y*) 1 Williams on Exors. 390.

Pending an  
Appeal to the  
Privy Council.

were correct, had no interest in the estate of the deceased (c). It seems, also, from the report of *Blake v. Blake*, as cited in the above case (d), that Lord Chief Baron Alexander, granted a Receiver pending an appeal to the delegates, even though the effect of the judgment of the Ecclesiastical Court was to confirm the probate, and the application was opposed by the executors to whom the probate had been granted. In *Liddell v. Liddell* (e), it appears, that where time had been granted by the spiritual Court to appeal, and before that time had expired or the appeal had been lodged, an application was made to this Court for a Receiver, the order was made, on the ground that the Spiritual Court, the time for appeal not being out, had refused to grant either probate or administration *pendente lite*.

Not granted as  
between joint-  
tenant and  
tenant in com-  
mon.

Upon the principle that the Court will not appoint a Receiver where the party applying has an estate which he can assert at Law, the Court will refuse to interfere against a joint-tenant or tenant in common in possession, at the suit of another joint-tenant or tenant in common, because the party complaining may at Law relieve himself by the writ of partition (f). It is upon this ground, that the Court has constantly refused to restrain a tenant in common from cutting timber, or doing any other act not amounting to destruction (g). It appears, however, to have been considered that, in the case of an undivided estate, the Court would appoint a Receiver at the instance of any tenant in common or joint-tenant, where, the defendant being in possession, receives the whole rent and excludes his companion from the share due to him (h); but in *Tyson v. Fairclough* (i), Sir J. Leach, V. C., expressed a doubt whether, even in the case of an actual exclusion of one tenant in common by another, this Court would appoint a Receiver. "If," his Honor observed, "it was an exclusion, which amounted to an ouster at Law, the party complaining must assert at Law his legal title. If it were not such an exclusion, this Court would compel the tenant in common in receipt of the rents to account to his companion, but would not, I think, act against his legal title to possession." In corroboration of this, it may be stated, that in *Willoughby v. Willoughby*, which is mentioned by Mr. Dickens, in his note to *Calvert v. Adams* (k), Lord Northington refused to

(c) His Lordship held also, that the circumstance of there being no person in whose name an action might be brought to recover the property, was not a sufficient objection to the appointment of a Receiver. 2 Beav. 289.

(d) Ibid. 293, n.

(e) Cited 12 Ves. 465.

(f) *Tyson v. Fairclough*, 2 S. & S. 142-144.

(g) Ibid.

(h) Vide *Milbank v. Revet*, 2 Mer. 405.

(i) Ubi supra.

(k) 2 Dick. 479.

appoint a Receiver of an undivided moiety, "putting this question : <sup>In the Case of Partnership.</sup> how could a Receiver, let, set, or distrain, or take any steps without the consent of the other co-partner ?" But although the Court will not grant a Receiver at the instance of one party entitled at Law to an undivided share of an estate, against another having a similar legal title, who may be in possession under such title, it will grant a Receiver of the applicant's share of the rents and profits ; thus, where a motion was made, on the part of an infant owner of one undivided third of a plantation in the West Indies, for a manager and consignee of the whole estate, Lord Eldon refused to grant it, saying he never knew an instance of such an appointment, at the instance of one tenant in common against another ; but that a Receiver might be appointed of the infant's share, who would receive his part of the clear proceeds from the person in possession (l).

It is to be observed, that the rule which has been laid down that the Court will not, in the case of tenants in common or joint-tenants, grant a Receiver against one at the instance of another, applies only where the plaintiff has a legal estate, — the case is different where the party applying has only an equitable interest ; there a Receiver will be appointed, because the party applying has no means of getting possession of his share ; this rule was acted upon in *Street v. Anderton* (m), where Lord Thurlow directed that the co-tenant should give security to account for one third of the rents to the plaintiff, otherwise that the order should go for a Receiver. <sup>Secus, where plaintiff has only an equitable estate ;</sup>

The Court will also appoint a Receiver of a mine, where it belongs to several parties who are working together, although the parties are tenants in common of it (n), the Court, according to Lord Hardwicke, considering property of this sort as in the nature of a trade (o) ; "and where persons have different interests in it, it is to be regarded as a partnership ; and the difficulty of knowing what is to be paid for wages and the expense of management, gives the Court a jurisdiction as to *mesne* profits which it would not assume with respect to other lands. <sup>or in the case of mines worked in partnership.</sup>

(l) *Lowndes v. Baddington*, MSS. Feb. 1805.

(m) 4 Bro. C. C. 413, [Perkins's ed. Mr. Belt's note.]

(n) *Jefferys v. Smith*, 1 J. & W. 186.

(o) Vide *Story v. Lord Windsor*, 2 Atk. 620, and cases there cited ; *Jesus College v. Bloom*, Amb. 56 ; *Sayer v. Pierce*, 1 Ves. 232, and Belt's Supp. 127, S.C. ; *Crawsfray v. Maule*, 1 Swanst. 518.

In the Case of  
Partnership.

In the case of  
partnership.

And here it may be noticed, that, in cases of partnership, the Court frequently appoints a Receiver of the partnership estate (1). In *Wilson v. Greenwood* (p), Lord Eldon observed, "When a partnership expires, whether by the death of the parties or by effluxion of time, without special provision as to the disposition of the property, in all those cases, to which I may add the bankruptcy of a partner, the partnership is considered in one sense as determined, but in a sense also as continued, that is, continued till all the affairs are settled; and, as in the ordinary course of trade, if any of the parties seek to exclude the other from taking that part in the concern which he is entitled to take, the Court will grant a receiver; so in the course of winding up the affairs after the determination of the partnership, the Court, if necessary, interferes on the same principle." From this it may be inferred, that a mere case of exclusion by one partner will afford a ground for the appointment of a Receiver, even where no dissolution of the partnership is contemplated; but the general rule appears to be, that the Court will not, upon motion, appoint a Receiver of partnership effects, unless it appears that the plaintiff will be entitled to a dissolution at the hearing (2), or unless the suit be so framed that a decree may be made, according to the intention of an instrument, which by the agreement of the parties is to regulate the

(p) 1 Swanst. 471, 480.

(1) *Innes v. Lansing*, 7 Paige, 583.

Upon a bill filed by one of the partners to close up a partnership concern it is a matter of course to appoint a receiver, if the parties cannot agree among themselves as to the disposition and control of the property. *Martin v. Van Schaick*, 4 Paige, 479. So a receiver will be appointed, as a matter of course, where either partner has a right to dissolve the partnership, and the articles of co-partnership do not provide for the settlement of the concern, upon a bill filed for that purpose. *Law v. Ford*, 2 Paige, 310.

A receiver may be appointed at the instance of a partner, alleging that the firm is insolvent, and that his co-partners are wasting the effects. *Williamson v. Wilson*, 1 Bland, 423.

A receiver will not be appointed merely because partners quarrel. *Henn v. Walsh*, 2 Edw. 129.

There can be no ground for a receiver in a case of partnership, when the partner applying to the Court has the property in his own possession, and the other does not object to such possession. *Smith v. Lowe*, 1 Edw. 33.

(2) *Garretson v. Weaver*, 3 Edw. 385.

To authorize the appointment of a receiver, in a copartnership suit, it must be such a case as would authorize a decree for a dissolution. Where a dissolution has already taken place, or it is apparent that it will be decreed, on the ground of some breach of duty or contract, a receiver will be appointed. *Henn v. Walsh*, 2 Edw. 129; *Story, Partnership*, § 228, 229, 230, 231, and notes; *Law v. Ford*, 2 Paige, 310; *Williamson v. Wilson*, 1 Bland, 418.

Where it is necessary to preserve the good-will of the business, the receiver may be directed to carry it on under the direction of the Court, until a sale can be effected. *Martin v. Van Schaick*, 4 Paige, 479.

of its being carried on (*q*); thus in *Goodman v. Whit-*  
(*r*), Lord Eldon lays it down, that if the Court can see, that  
dution of the partnership must take place, it follows very  
of course that a Receiver must be appointed; but if the  
ade stands in such a state, that the Court cannot see whether  
be dissolved or not, it will not take into its own hands the  
ct of a partnership which only *may* be dissolved. It may be  
tion, whether the Court will not restrain a partner, if he has  
improperly, from doing certain acts in future; but if what  
done does not give the other party a right to have a disso-  
of the partnership, what right has the Court to appoint a  
ver and make itself the manager of every trade in the  
om (*s*)?

In the Case of  
Partnership.

s, however, to be observed, that there are cases in which  
Eldon himself has held, that, even where no dissolution is  
t, the Court will grant a Receiver. These are where suits  
een instituted to compel partners to act according to the  
ions of instruments into which they have entered; in such  
the Court will take care that the decree shall not be de-  
l by any thing to be done in the mean time, and will appoint  
ceiver to protect the property (*t*). Thus where, in 1812,  
en proprietors of Covent Garden Theatre executed a deed  
ich they covenanted and agreed that the profits of the Thea-  
uld be exclusively appropriated to particular purposes, and  
e treasurer for the time being should be irrevocably direct-  
to apply the profits; and, in 1822, parties who had become  
d under the former proprietors to seven-eighths of the theatre,  
d into an agreement which provided in some respects for a  
nt application of the profits, and otherwise affected the  
of a party interested in the remaining eighth, who was  
nsulted on the subject, the Court, upon a bill filed by that  
for the specific performance of the covenants and agreements  
ined in the deed of 1812, appointed a Receiver.

Where no dis-  
solution is  
sought.

rules with regard to the appointment of a Receiver in the  
f partnerships, are very clearly laid down in Mr. Collyer's  
le treatise on the Law of Partnership (*u*) — "Where a dis-  
m is intended, or has already taken place, a Court of Equi-  
l appoint a Receiver, provided there be some breach of the

General rules  
with regard to  
Receivers in  
the case of  
partners.

*Const v. Harris*, T. & R. 496, bills can be sustained for partnership  
J. & W. 589, 592. accounts, without seeking a dissolu-  
tion of partnership, vide ante, 382.  
*vide etiam*, *Olive v. Hamilton*, (*t*) *Const v. Harris*, T. & R. 496.  
. 453; as to question whether (*u*) Collyer on Partnership, p. 196.

In the Case of  
Partnership.

duty of a partner, or of the *contract* of partnership (x). Thus if, in breach of moral obligation, one partner unjustly takes possession, and refuses to give security to his co-partner for his share of the stock, monies, and securities (y); or if he in any respect behaves *unrighteously* against the interest of the other partner, a Receiver will be appointed (z). So, also, if in breach of the contract of partnership, he carries on the trade with the partnership effects on his separate account, after the dissolution (a), and thus or in any other manner excludes his co-partner from the share to which he is entitled in winding up the concern, a Receiver will be appointed" (b).

Where one  
partner is  
dead.

The same rules which prevail respecting the appointment of a Receiver in a suit between partners, are applicable in a suit between the representative of a deceased partner and the surviving partner (1). However, in the case of *Hartz v. Schrader* (c), where the bill was filed by the administrator of a deceased partner

(x) *Harding v. Glover*, 18 Ves. 281; *Estwick v. Conningsby*, 1 Vern. 118. In *Skip v. Harwood*, a Receiver was appointed of the brewery—"It was ordered that it should be referred to the Master to appoint a proper person to be a Receiver of the stock, goods, &c. of the brewing trade, and the debts due to the partnership; that the defendant be restrained from receiving any debts due or to become due in the said trade; that the Master do allow the Receiver a reasonable salary for his care, he giving security, &c.; that such Receiver do act as broad clerk in the said brewing trade, and collect and get in the debts according to the custom and usage of the trade; and out of the money to be received on account of the said debts, &c., that the said Receiver do pay the excise, and the charges, &c. in the said brewing trade; that the said Receiver be at liberty to bring actions for such debts as are now or shall become due, as occasion shall require; and the persons in whose names such action shall be brought, are to be indemnified against any costs and damages on account thereof, out of the stock, goods, and effects, in the said trade. The stock, goods,

and money in the hands of the Receiver, to be applied as the Court shall direct. The books relating to the trade to be in his custody. In the mean time, the defendants to be restrained from alienating, disposing, or removing, any of the utensils or dead stock belonging to the said trade." R. L. 1748. B. 517.

(y) *Peacock v. Peacock*, 16 Ves. 49; *Milbank v. Revet*, 2 Mer. 40.

(z) If partners quarrel, and one of them behaves *unrighteously* against the interest of the other, a Receiver will be appointed, but if partners quarrel, a Receiver will not merely on that account be appointed." Lord Eldon, *Texeira v. Da Costa* in Chancery, Nov. 1815, *Cook MSS.*

(a) *Harding v. Glover*, ubi supra.

(b) The dissolution which takes place on the refusal of an appointee under a will to become a partner, clearly not a dissolution arising from the exclusion of the appointee from the surviving partners, and will therefore be no foundation for a Receiver. *Kershaw v. Matthews*, 2 Russ. 62.

(c) 8 Ves. 317, [Sumner's ed. note (b)]; 2 Hov. Supp. 106, S. C.

(1) Collyer, Partnership, (2nd Am. ed.) 197.

If the surviving copartner wastes the funds, the Court would, on a proper application, protect the estate of his deceased copartner, by obliging him to give security, or will appoint a receiver. *Higginson v. Adir*, 1 Desaus. 429.

against the surviving partner, and a motion was made to restrain the defendant from disposing of the joint stock, and receiving the outstanding debts, and for a Receiver, and the affidavits stated, according to the *information and belief* of the deponent, "That the defendant is in embarrassed circumstances and at present imprisoned in Newgate for a separate debt, and now expends the joint stock, or the monies received by him for the outstanding debts, in the maintenance of himself and his family, and not in discharge of the debts due from the partnership," Lord Eldon made the order for an injunction, but refused it as to a Receiver.

In the Case of Partnership.

Where all the partners are dead, and a suit is instituted between their representatives, a Receiver will be appointed as a matter of course; "for," as Lord Kenyon observed, "where there is a co-partnership there is a confidence between the parties; and if one dies, the confidence in the other partner remains, and he shall receive; but where both are dead, there is no confidence between the representatives, and therefore the Court will appoint a Receiver" (*d*).

Where all the partners are dead.

The Court will also appoint a Receiver pending an investigation into the title to an estate, in a suit for the specific performance of an agreement; and this it will do at the suggestion of the vendor, reserving, however, the consideration of the question at whose expense it should be (*e*); in *Boehm v. Wood* (*f*), where an appointment of this nature had been made, and the purchaser was afterwards compelled to take the title, Lord Eldon held it to be clear that the Receiver was to be considered as his Receiver.

In suits for specific performance of agreement.

In *Hall v. Jenkinson* (*g*), which was also a case of specific performance, the Court, at the instance of the plaintiffs, granted a Receiver after the answer of the purchaser, who was in possession, upon his admission of insolvency and intention to sell and convey.

A Receiver may likewise be appointed of the rents and profits of an infant's estate, provided there be a bill filed (*h*); but the Court will not appoint a Receiver, in such case, on petition merely. It seems, however, that, in the case of idiots, or lunatics, a Receiver has been appointed, upon petition, where no person could be found disposed to act as committee (*i*).

In cases of infancy.

(*d*) *Philips v. Atkinson*, 2 Bro. C. C. 272, [Perkins's ed. notes (1) and (*e*)].

(*e*) *Boehm v. Wood*, 2 J. & W. 236.

(*f*) T. & R. 332, S. C.

(*g*) 2 V. & B. 125.

(*h*) *Anon.* 1 Atk. 489, 578; *ex parte* Whitfield, 2 Atk. 315. See post, ch. xli.

(*i*) *Ex parte* Warren, 10 Ves. 622; and vide *Anon.* 1 Atk. 578.



Of what  
Things.

Of what things  
a Receiver  
may be  
appointed.  
Of rents and  
profits.

— of a rec-  
tory.

Of an office.

Pension grant-  
ed by the  
Crown.

*Secus*, the  
half-pay of an  
officer,

and a pension  
granted to sup-  
port the digni-  
ty of a Peer.

Having considered the circumstances under which the Court will appoint a Receiver, it is convenient in this place to call the reader's attention to the nature of the property which the Court will take under its protection by means of such appointment.

It may be collected from what has been already laid down, that a Receiver may be appointed of the rents and profits of lands, houses, &c., and also of all personal estate which is capable of being reduced into possession. In *Davis v. The Duke of Marlborough* (*k*), it was held that, in favor of equitable creditors, the Court will appoint a Receiver of all property against which a legal creditor might obtain execution; upon this ground a Receiver has been appointed of the profits of a rectory (*l*), under an *equity*. The appointment is not, however, confined to such property as is liable to be taken under an execution at Law, but has been extended to whatever is considered in Equity as assets; and, therefore, in *Blanchard v. Cawthorne* (*m*), a Receiver was appointed at the instance of a judgment creditor of the office of master forester of a royal forest.

So, also, in *Palmer v. Vaughan* (*n*), the profits of the office of Clerk of the Peace for a county, having been assigned for the payment of creditors, a Receiver was appointed pending the discussion of a question as to the validity of the assignment; but in *Cooper v. Reilly* (*o*) a Receiver was refused, pending such a discussion, of the salary of Assistant Parliamentary Counsel to the Treasury, on the ground that the salary of such an office was not assignable upon grounds of public policy.

It has already been shown, that a pension granted by the Crown is capable of being taken under a sequestration for want of an answer (*p*), it may therefore be assumed, that such a pension may be the subject of a Receiver; the rule, however, will not extend to the half pay of an officer in the Army or Navy, which, as we have also seen, is, upon grounds of public policy, exempt from the operation of a sequestration (*q*). So, also, it has been held, that a pension granted by the 4 & 5 Ann. c. 4, for the more honorable support of the dignities of the Duke of Marlborough, to the persons, severally and successively, to whom the same should come by virtue of that Act, with a proviso that the acquittance of every such person should be a sufficient discharge, was, upon grounds of public policy, inalienable, and therefore not the subject of a

(*k*) 2 Swanst. 132.

(*l*) *Silver v. Bishop of Norwich*, 3 Swanst. 112; *White v. Bishop of Peterborough*, *ibid.* 109.

(*m*) 4 Sim. 566.

(*n*) 3 Swanst. 173.

(*o*) 2 Sim. 560; 1 R. & M. 560; S. C.

(*p*) Ante, 1262.

(*q*) *Ibid.*

ar, although the estates (which by the 5 Ann. c. 3, were to the Duke for life with remainder) in tail male, &c., in manner, that they might always go along and be enjoyed the titles and dignities, with a proviso that they should not be to the injury of the persons in remainder, were held to be able during the life of the person in possession, and to be the subject of a Receiver during his life (*r*). A Receiver will also be appointed of heirlooms (*s*) or of turnpike tolls, but the Court will not appoint a Receiver of parochial rates to be assessed and collected at a future period (*u*). It is not necessary in order to authorize the Court to make an appointment of a Receiver that the property in respect of which he is to be appointed should be in England; a Receiver will be appointed of property in the East Indies (*x*); in which case the Receiver and his sureties who are resident in England. A receiver may be appointed of estates in Ireland, but it seems that, in such cases, the recognizances of the Receiver and his sureties may be taken into and inrolled in that country (*y*). It may also be mentioned, that officers in the nature of Receivers are frequently appointed of plantations in the West Indies, but a plantation in the West Indies partakes, in some measure, of the nature of a manufactory or trade, instead of a Receiver the person appointed is usually called a Manager (*z*).

Of what Things.

Heirlooms. Turnpike tolls,

Secus, parochial rates not assessed.

Of estates out of England. Estates in the East Indies, in Ireland.

Of plantations in the West Indies.

## SECTION II.

*Who may be a Receiver.*

Generally speaking, a Receiver should be a person wholly disinterested in the subject-matter of the suit, but in some cases, although he may be mixed up with the suit, a person so situated

Party interested.

*vis v. Duke of Marlborough*, 74; 2 Swans. 125.

*Willesbury v. Duke of Marlborough* on Dec. 330.

*App v. Williams*, 4 Ves. 430;

*v. Ashbrooke*, 3 Russ. 98, n.

*ewry v. Barnes*, 3 Russ. 94.

*ckburn v. Raphael*, 2 S. &

*n — v. Lindsey*, 15 Ves.

*Eldon* appointed a Receiver

in England with liberty to

his own agent in India; vide

*Equity Draftsman*, vol. ii. 348.

(*y*) Vide stat. 43 Geo. III. c. 90, and ante, vol. i. p. 337. The order directs the recognizances of the Receiver and his sureties to be acknowledged before a Master of the Court of Chancery in Ireland, and to be entered and inrolled there, and the entering and inrolling to be duly certified to the Court by the Master of the Court of Chancery in Ireland.

(*z*) Vide post, Sect. 8.

- Who may be appointed. may be appointed (a) (1). Thus in a suit to establish a will, the heir at law has been appointed Receiver till after the trial of an issue. So also it has been held, that a trustee may, under circumstances, be a Receiver (b), provided he will accept the appointment without emolument (c). But in no case can a trustee, or other party to a cause, be a Receiver *with emolument*, unless no one else can be procured who will act with the same benefit to the estate (d); and it is to be observed that, even where he is disposed to act without emolument, the Court will not appoint a trustee to be a Receiver, where he is the person to watch and check the Receiver for the benefit of the parties interested (e).
- Heir at law.
- A Trustee.
- Person whose duty it is to check the Receiver not appointed. The rule that the Court will not sanction the appointment, as Receiver, of a person whose duty it is to check and control the individual appointed, is extended to other persons besides trustees; thus it has been held, that a Master in Chancery cannot be appointed committee of a lunatic's estate, because it might, according to the then practice, have become his duty to pass the accounts in the lunacy; and it may therefore be affirmed that the Court would, upon similar grounds, refuse to appoint a Master in Chancery to be a Receiver (f). Upon the same principle it has been held, that, as it is the duty of the next friend of an infant to watch the accounts and conduct of a Receiver of the infant's estate, the two characters are incompatible with each other (g); and, in *Taylor v. Oldham* (h), Lord Eldon held that the son of a next friend ought not to be a Receiver.
- c. g. a Master in Chancery;
- next friend of infant;
- son of a next friend.
- Solicitor in the cause cannot be a Receiver, Upon similar grounds it has been held, that a solicitor in the cause cannot be appointed as Receiver, because it is his duty to control the Receiver's accounts (i). It is no objection however, to a person proposed, that he is a practising barrister (k); and although,

(a) *Fingal v. Blake*, 2 Moll. 50.(b) *Sykes v. Hastings*, 11 Ves. 363.

(c) A party to the suit cannot be appointed by a Master, unless the order of a reference contains an express authority to that effect.

(d) *Fingal v. Blake*, 2 Moll. 50; *Sykes v. Hastings*, 11 Ves. 364; — *r. Jolland*, 8 Ves. 72, [Sumner's ed. note (a)]; *Anon.* 3 Ves. 515, [Sumner's ed. note (b)].(e) *Sutton v. Jones*, 15 Ves. 588.(f) *Ex parte Fletcher*, 6 Ves. 427.(g) *Stone v. Wishart*, 2 Mad. 64.(h) *Jac.* 527, 529.(i) *Garland v. Garland*, 2 Ves. J. 137; in *Bagot v. Bagot*, Sir L. Shadwell, V. C., on the application of a married woman for a Receiver of her separate estate, appointed her solicitor to that office, on her nomination in Court, without a reference to the Master, although a strong affidavit was made by the husband showing the unfitness of the solicitor for the office. The party appointed undertook to act as Receiver without salary. 2 Juris., 1063.(k) *Garland v. Garland*, ubi sup.(1) See *Downshire v. Tyrrell*, Hayes, 354.

in *Wynne v. Lord Newbrough* (l), Lord Eldon appears to have considered that the circumstance of the gentleman who was appointed being a barrister practising at a distance from the estate, was one which deserved consideration, yet many instances have since occurred in which barristers practising in London have been appointed Receivers of estates at a distance (m) (1).

Who may be appointed.

but barrister may.

In *Wynne v. Lord Newborough* (n), before referred to, the Receiver appointed by the Master, besides being a barrister, was also a member of the Commons House of Parliament; and Lord Eldon, although he did not consider that circumstance as affording any positive ground of objection to his appointment, held that it was one which deserved great consideration; and, in *Attorney-General v. Gee* (o), he determined that a Peer could not be a Receiver, because, "in many instances, a Receiver may be committed," — a reason which equally applies to a member of the House of Commons as to a Peer.

A Member of Parliament cannot.

It seems, also, that the Receiver-general of Taxes for a county cannot be appointed a Receiver; for, having given, as such, security to the crown, if he were to become indebted to the crown and to the estate, the crown might, by its prerogative process, sweep away all his property (p). Upon the same ground it might be held, that any person who is in the situation of an accountant to the crown would be objectionable.

Receiver-general of Taxes cannot be appointed.

Nor as it appears any accountant to the crown.

### SECTION III.

#### Appointment of Receivers.

THE Court has no jurisdiction to appoint a Receiver, unless a cause is pending (q); therefore, a Receiver cannot be appointed

Receivers not appointed except on bill.

- |  |  |
|--|--|
| (l) 15 Ves. 283.   | (n) 15 Ves. 283.                                 |
| (m) In <i>Townshend v. Townshend</i> , a practicing barrister resident in London was appointed Receiver of estates in Norfolk. | (o) 2 V. & B. 208.                               |
|  | (p) <i>Attorney-General v. Day</i> , 2 Mad. 254. |
|  | (q) <i>Anon.</i> 1 Atk. 578.                     |

(1) In the case of the Franklin Bank, as referred to in *The Attorney-general v. The Bank of Columbia*, 1 Paige, 417, Chancellor Walworth decided, that it was improper for an officer of an insolvent corporation to be the receiver of its property. This case arose before the passage of the Revised Statutes in New York. But under the New York Act of voluntary dissolution of corporations, an officer of a corporation can be appointed a receiver. 2 Rev. Stat. (N. Y.) 468, § 66. Still it does not appear that it is obligatory on the Court to appoint the officers receivers, under this statute. *Edwards Receivers*, 57, 58.

In the *Matter of the Eagle Iron Works*, 8 Paige, 385; S. C. 3 Edw. 385, it was held, that the president and book-keeper of an insolvent manufacturing corporation can be appointed receivers.

1. The first step in the process of the transfer of the land is the appointment of a Receiver of the land. The Receiver is appointed by the Government and is responsible for the management of the land. The Receiver is also responsible for the collection of the land tax. The Receiver is appointed for a period of five years and may be re-appointed for a further period of five years. The Receiver is appointed by the Government and is responsible for the management of the land. The Receiver is also responsible for the collection of the land tax. The Receiver is appointed for a period of five years and may be re-appointed for a further period of five years.

1. The following information is being furnished to you for your information only. It is not to be used for any other purpose.

[illegible]

<sup>10</sup> It must also satisfy several requirements under the Code to qualify as a charitable deduction.

... before named: Edwards, Receivers, 19: Bloodgood & Clark

In *Metcalf v. Pulvertoft* (a), Lord Eldon says, "With respect to appointing a Receiver before answer, I take it that the cases where the Court has refused it turned upon this, — that the party applying for the appointment could not state that he had, strictly speaking, an equitable title." But even where that is the case, yet if the defendant answers the plaintiff's affidavit and admits his case, a Receiver will be appointed (b).

Application  
for.

But the Court will not only appoint a Receiver before answer, it will, in cases of urgency, entertain the application before appearance (c); it is to be observed, however, that the general rule of the Court is, that a motion for a Receiver cannot like a motion for an injunction be made without notice (d); if, therefore, a Receiver is to be applied for, before appearance, notice of the motion must be served upon the defendant personally, to authorize which, it is to be recollected, there must, in some cases, be a previous application to the Court for leave to make such service (e) (1); the fact of which having been obtained must be mentioned in the notice of motion. The rule, however, which requires previous notice to be served upon a defendant who has not appeared, is subject to exception where the defendant is resident out of the jurisdiction of the Court, and cannot be served (f) (2).

Before appearance.

Must be upon  
notice.

The Court will also appoint a Receiver after an interlocutory decree, and this it will do upon motion, notwithstanding a reservation of all matters under the decree; because such an appoint-

After decree.

(a) *Ubi supra*.

(b) *Vide Vann v. Barnett*, *ubi supra*, where the Receiver would not have been appointed, but for the defendant's affidavits; *vide etiam*, *Jervis v. White*, *ubi supra*.

(c) *Tanfield v. Irvine*, 3 Russ. 149; *ante*, p. 416.

(d) *Per Leach*, Arg. 1 Ves. & B. 183.

(e) *Hill v. Rimell*, 2 M. & C. 641; *ante*, pp. 1794 & 1796.

(f) *Vide ante*, p. 1855.

*Paige*, 574; *Osborn v. Heyer*, 343; *West v. Swan*, 3 Edw. 420; *Willis v. Corlies*, 2 Edw. 281.

(1) As a general rule, a receiver should not be appointed without notice to the parties interested. *People v. Norton*, 1 *Paige*, 17.

But this rule is subject to exceptions in special cases, where irreparable injury would be sustained by the delay. *Ib.*; *Gibson v. Martin*, 8 *Paige*, 181. As, where the property to which the receivership relates would be likely to perish before the defendant could have notice and be heard on the application for a receiver. *Gibson v. Martin*, 8 *Paige*, 481.

(2) See *Gibbins v. Mainwarring*, 9 *Simons*, 77; *Verplank v. Merc. Ins. Co.* 2 *Paige*, 438.

A receiver ought not to be appointed on an *ex parte* application, where an advertisement for the defendant, a non-resident, is running for his appearance, unless special circumstances are shown. *Sanford v. Sinclair*, 8 *Paige*, 373, S. C.; 3 *Edw.* 393. But such an appointment may be made *ex parte*, where it is necessary to prevent the property from being wasted or removed beyond the jurisdiction of the Court. *Ib.*

### Of Receivers.

ment is a mere provisional proceeding, and does not affect the question between the parties (g); and it was held, by Sir Anthony Hart, L. C. (in Ireland), that, after a hearing and a rehearing had taken place, and although the Court had refused a Receiver, the party was entitled to have one, on further directions, as he showed, by the report, an altered state of facts, (such as a balance in the hands of the defendant), which entitled him to say that now a Receiver should be granted (h).

Affidavit in support of, when required.

Where the application for a Receiver is made before answer, it must be supported by affidavits verifying the facts which are relied upon by the party making it; after answer, the plaintiff can only rely upon the admissions in the answer; but where a notice of a motion for a Receiver was given on the 30th of May, for the 2nd of June, in support of which the plaintiff filed an affidavit, and the answer was put in on the 2nd of June, on which day the motion was to have been made, but the motion was postponed, upon the plaintiff's making the application; at a subsequent time, it was objected, on the part of the defendant, that the plaintiff was not entitled to read the affidavit, but Lord Eldon said that the practices in such cases was, to allow the affidavit to be read and to look upon the answer as a counter-affidavit (i) (1).

And so where one defendant, only, of two material defendants had answered, the plaintiff was permitted to read his affidavit in support of the application, and the answer of the defendant which had come in was treated as an affidavit (k).

Form of order.

The order, when made, usually refers it to the Master to appoint a proper person to be the Receiver (2), either of the rents and profits of the estate, &c., mentioned in the pleadings, or of the outstanding personal estate and effects of the testator, or of the partnership firm in the pleadings mentioned, (as the case may

(g) *Cooke v. Gwyn*, 3 Atk. 690. & W. 589; vide *Glaslington v.*

(h) *Attorney-General v. Mayor of Thwaites*, 1 S. & S. 134. *Galway*, 1 Moll. 95-104.

(k) *Kershaw v. Mathews*, 1 Russ. 361.

(i) *Goodman v. Whitcomb*, 1 J. 361.

(1) Where the plaintiff uses affidavits, the defendant may also read depositions. *Edwards, Receivers*, 66.

(2) See the *Atty.-Genl. v. Bank of Columbia*, 1 Paige, 511.

A receiver will not be appointed over the possession of another receiver; but the proper motion is, that the receiver already appointed shall be extended to the cause in which it is sought to appoint one. *Vialle v. O'Reilly*, 1 Hogan, 199; *Osborn v. Heyer*, 2 Paige, 342; *Downshire v. Tyrrell*, *Hayes*, 354.

For the practice in reference to the Master, see *Edwards, Receivers*, 64, seq.

be,) and to allow him a proper salary for his care and pains therein; the person so to be appointed first giving security to be approved of by the said Master, (and to be taken before a Master extraordinary in the country if there should be occasion,) duly and annually to account for and pay what he shall so receive, as hereinafter is directed, or as the Court shall direct.

Form of  
Order.

But although it is usual to include in the order a direction that the Receiver shall give securities, yet it sometimes happens, that where the parties in the cause name the Receiver, the Court will appoint him upon his own recognizance only (l) (1), and where the appointment of a person to be Receiver, was made by the testator and confirmed by the Court, the personal recognizance of such a Receiver was held sufficient (m).

In what cases  
without sure-  
ties.

If the Receiver is of rents and profits of real estates, the order directs that the tenants of such estates shall attorn and pay their rents in arrear and growing rents to such Receiver, who is to be at liberty to let and set the estates, from time to time, and to manage the same (n), with the approbation of the Master, as there shall be occasion (o).

Where Re-  
ceiver is of  
real estate.

If the Receiver be of outstanding personal estate or of partnership property, the order generally goes on to direct the executors, or other parties, to deliver over to the person to be appointed Receiver all securities in their hands for such outstanding debts and effects, together with all books and papers relating thereto: and that, in case there shall be any occasion to put any of the debts in suit for the recovery thereof, the same shall be done with the approbation of the Master; and such person, to be appointed, is to make use of the name or names of the executors or other parties for that purpose who are to be indemnified out of the estate and effects (p).

Of personal  
property.

In either case, the order directs, that the person to be appointed Receiver shall, from time to time, annually pass his accounts before the Master (q), and pay the balance that shall be reported due from him, into the Bank, with the privity of the Accountant-General of the Court, to be there placed to the credit of the cause in which the order is made, subject to the further order of the Court (r).

As to passing  
accounts and  
payment of  
balance.

(l) *Countess of Carlisle v. Lord Berkley*, Amb. 599; *Ridout v. El. Plymouth*, 1 Dick. 68.  
(m) *Hibbert v. Hibbert*, 3 Mer. 31.

(n) Vide Ord. 1828, LXIV. post.  
(o) *Seton* on Dec. 316.  
(p) *Ibid.* 323.  
(q) *Ibid.*  
(r) *Ibid.* 346.

(1) But see *Bailie v. Bailie*, 1 Irish Eq. 413.



Proceedings  
upon Order.

Where ap-  
pointed on be-  
half of incum-  
brancers.

If the Receiver is appointed on behalf of a mortgagor or other incumbrancer, the order generally contains a direction that the appointment of the Receiver is not to affect the prior incumbrances upon the estate who may think proper to take possession of the estates and premises, by virtue of their securities respectively (s); and it usually directs the Master to inquire what incumbrances there are affecting the estate, and into the priorities thereof respectively; and orders that the person to be appointed Receiver do, out of the rents and profits to be received by him, keep down the interest and payments in respect of such incumbrances according to their priorities, and do also pay the balance, &c., into the Bank, &c. (t).

Where party  
in the cause is  
to be proposed.

Where a party to the cause is to be proposed as a Receiver, the order must contain a direction that the party intended to be proposed, or any of the parties, shall be at liberty to propose himself (u) (1).

Appointment  
of more than  
one Receiver.

Where the estates lie very remote from each other, or are very large, the Court will direct the appointment of more than one Receiver; the Master, however, has no power, under a direction to appoint a Receiver, to appoint more than one—there must be a special direction to that effect (2).

State of facts  
and proposal.

The order having been passed and entered, is to be carried into the Master's Office, and proceeded upon nearly in the same manner as orders for the appointment of new trustees (x).

The state of facts and proposal of the person to be Receiver, is generally carried in by the party obtaining the order of reference, but any other party may carry in a proposal. It is to be recollected, however, that a party to the record cannot propose himself as Receiver without the leave of the Court (y).

— cannot be  
carried in by a  
stranger.

A stranger cannot propose a person to be a Receiver (z), and it seems doubtful whether, if all the parties neglect to propose a Receiver, the Master can propose one himself: and in *Attorney-general v. Day* (a), where, upon the neglect of the parties, the Master had, himself, proposed a Receiver, the Court, although it did not actually express its disapprobation of the proceeding,

(s) Ibid. 322.

(t) Vide ante, p. 486-7.

(u) Vide ante, p. 1972-3, n., but a party to the record cannot be a Receiver unless he consents to act without salary. Ibid.

(x) Ante, p. 1446.

(y) Supra.

(z) *Attorney-General v. Day*, 3 Madd. 257.

(a) Ubi supra.

(1) See *Downshire v. Tyrrell, Hayes*, 354.

(2) See ante, 1976, note.

ought it right, under the circumstances, to direct the Master to view his report. Proceedings upon Order.

A state of facts and proposal for the appointment of a Receiver usually sets out the particulars of the property over which the Receiver is to have authority, and if it consist of lands or houses, other property of that nature, the yearly rental, &c., and it ends proposing the person intended to be appointed, with his description, and the names of the persons to be proposed as securities (b). This must be supported by an affidavit stating the yearly other value of the property (c). There must also be an affidavit of the sufficiency of the sureties, each of whom must swear at they are worth double the amount of the property, or yearly rent of the property, in question (d); this, however, is not necessary to be brought in till the Master has determined who is to be Receiver. Form of proposals.

The usual warrants, "*on leaving*," and "*to proceed*," having been obtained and served (e), the Master, upon the day named in the warrant, proceeds to make the appointment, and if there is a proposal and counter-proposal, he decides between them, and allows the proposal of that party who in his judgment has proposed the most fitting person. It has sometimes happened, when the appointment has been contested, and the order has authorized the Master to appoint more than one Receiver, that he has, by consent, allowed the proposal of each, and appointed two receivers (f). It is to be noticed, that the order referring it to the Master to appoint a Receiver, directs that the Master shall appoint, and not that he shall approve, as in the case of a guardian; the Master, therefore, proceeds at once to make the appointment, without any intermediate report to the Court (g).

It may be mentioned here, that the order directs the Master to appoint a Receiver, &c., "*he first giving security to be approved by the Master*" (1). Securities to be given. The course of the Court, under this or-

(b) Bennett, 94.

(c) Ibid.

(d) Ibid. In the cause of *Lamport v. Lamport*, on the 12th of April, 1837, where a Receiver had been appointed of the stock in trade and assets of a jeweller, amounting in value to 7000*l.* the Master, Sir G. Wilson, required a recognizance in 8000*l.* being 1000*l.* above the sworn value

of the property and the assets, in analogy to the practice of special bail at Common Law. Archbold's Pract. Q. B., 7th ed. 596; ex relatione Mr. Rogers, of the Registrar's Office.

(e) Ante, p. 1353.

(f) 1 Turn. & V. 455, 6.

(g) *Bowersbank v. Cassidaer*, 3 Ves. 165, [Sumner's ed. note.]

(1) In the appointment of a receiver, the Court will require him to give security for the faithful discharge of the trust. *Tomlinson v. Ward*, 2 Conn. 6.

Proceedings  
upon Order.

der, requires the security to be given by the Receiver, and sureties in a recognizance; and that where, instead of following this course, the Master had taken an assignment of a mortgage, belonging to a Receiver, Lord Hardwicke considered that he acted very improperly (*h*).

Recognizance.

When the Master has decided upon the proposal, the draft of the recognizance to be entered into by the Receiver and his sureties, and of an affidavit of the sufficiency of the sureties, will be prepared in the Master's office. A warrant must then be taken out by the solicitor on "preparing the recognizance and affidavit," and served on the adverse solicitors, and copies may then be taken by the Receiver and the other parties interested in the appointment. The recognizance is then engrossed upon the proper stamp, and the affidavit having been also engrossed, the Master signs his allowance in the margin of each; and a report of the Master's approval of the Receiver, and of his having settled and allowed the recognizance and affidavit, is prepared, and warrants *on preparing, to settle, and to sign*, are severally taken out and served. Copies of the report are usually taken by the solicitors for the parties interested, and it is afterwards transcribed and signed by the Master, and usually remains in the Master's Office until the report appointing the Receiver is signed (*i*).

How entered  
into.

The next proceeding is to take out a warrant for the Receiver and his sureties, and to enter into the recognizance; and for the sureties to swear the affidavit of sufficiency; for this purpose, the Receiver and his sureties must personally attend and enter into the recognizance before the Master, and the sureties must justify, by affidavit of their sufficiency. (If they are in the country, however, the recognizances, &c. may be taken before a Master extraordinary). The recognizance is then carried by the Master's clerk to the Inrolment Office in Chancery, and inrolled there (*h*), and a receipt taken: the affidavit remains in the Master's office.

Report of ap-  
pointment;

A draft report of the appointment of the Receiver must then be prepared, and copies taken by the Receiver and all parties interested, and warrants *on preparing the report, and to settle and sign*, taken out, served, and attended; the report is then transcribed

(*h*) Mead v. Ld. Orrery, 3 Atk. 237.

(*i*) 1 T. & V. 456.

(*k*) It seems that, according to the practice of the Petty Bag Office, all recognizances must be inrolled within six months; vide Bothomley v. Fairfax, 1 P. Wms. 340; but leave

will be given to inrol them *non pro tunc*; Vaughan v. Vaughan, 1 Dick. 90; as to whether such inrolment will prejudice subsequent incumbrancers, vide Bothomley v. Fairfax, *ubi supra*; and Fothergill v. Kendrick, 3 Vern. 254.

and signed by the Master, which, together with the report of approval, must be filed at the Report Office, and office-copies taken by the Receiver and all parties interested in the appointment. The report, however, requires no confirmation (*l*). Proceedings upon orders. requires no confirmation.

The costs of the appointment and incidental proceedings must, in the first instance, be paid by the Receiver, who, in passing his first account, will be allowed such costs, upon his bringing in a bill of them to be taxed (*m*).

It seems that the proper way to bring before the Court the propriety of the Master's selection of a Receiver, is by excepting to his report of approval (*n*); it may, however, be done by petition (*o*) (1). Exceptions to Report; — how taken;

The judgment of the Master, however, in the selection of a Receiver, is never disturbed by the Court, unless it is shown that the person appointed is improper (*p*) (2); and it then requires a strong case to induce the Court to interfere with the Master's judgment (*q*); and it will not, in such a discussion, enter into comparisons as to the eligibility of the different individuals proposed (*r*) (3). — proceedings upon.

But although the Court is reluctant to suppose the Master wrong in the appointment which he has made, yet it will, where a strong case is made of objection to the individual appointed, refer it back to the Master to review his report (*s*) (4).

(*l*) Ante, p. 1486.

(*m*) 1 T. & V. 457.

(*n*) *Creuze v. Bishop of Lond.* 2 Dick. 687; 2 B. C. C. 253 [Perkins's ed. note (1)], S. C.; *Tharpe v. Tharpe*, 18 Ves. 317 [Sumner's ed. note (*a*)]; in this case the report erroneously states that the exception was to the Master's appointment. On reference to the original exceptions, it appears that they were taken to the first report, which is that of approval; vide ante, p. 1490.

(*o*) *Wynne v. Lord Newborough*, 15 Ves. 283.

(*p*) *Garland v. Garland* 2 Ves. J.

137; *Anon.* 3 Ves. 515; *Thomas v. Dawkins*, 3 Bro. C. C. 508; 1 Ves. J. 452, S. C.; *Creuze v. Bishop of London*, 2 Bro. C. C. 253 [Perkins's ed. note (1)]; 2 Dick. 687, S. C.; *Wilkins v. Williams*, 3 Ves. 588.

(*q*) *Bowersbakh v. Cassidaer*, 3 Ves. 164 [Sumner's ed. note (*a*)].

(*r*) Ibid.; *Tharpe v. Tharpe*, 12 Ves. 317 [Sumner's ed. note (*a*)].

(*s*) *Creuze v. Bishop of London*, 2 Bro. C. C. 253 [Perkins's ed. note (1)]; *Wynne v. Lord Newborough*, 15 Ves. 284; et vide *Atty.-Gen. v. Day*, 2 Mad. 246, and the cases there cited.

(1) See *Matter of the Eagle Iron Works*, 8 Paige, 388.

(2) *Matter of Eagle Iron Works*, 8 Paige, 385; S. C. 3 Edw. 385.

(3) See *Matter of Eagle Iron Works*, 8 Paige, 385.

(4) Where such a case exists, the party, who objects, after stating the grounds of his objection in his petition, should pray, that the Master review his report. This petition must be served upon all parties interested, and be moved upon in Court upon regular notice. *Wynne v. Lord Newborough*, 15 Vesey, 283. And if the Court should be in favor of the petition by ordering the Master to review his report, then the parties will proceed by proposing a new person or persons, and issuing summonses as before. *Smith on Receivers*, 11; *Edwards, Receivers*, 80, 81.

**Effect of Ap-  
pointment.**  
**Effect of Ap-  
pointment.**

A Receiver appointed by this Court is appointed on behalf of all parties, and not of the plaintiff or of one defendant only (f); therefore, if any loss arises from deficiency in his account, the estate must bear it (u). The effect of the appointment, however, is not to oust any party of his right to the possession of the property, but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it (z); and when the party entitled to the estate has been ascertained, the Receiver will be considered as his Receiver (y). It is to be observed, however, that where in consequence of the inability of the vendor of an estate sold under a decree to make out his title, a Receiver had been appointed, the Court thought that the expenses of the Receiver ought not to be borne by the purchaser, and directed that they should be repaid to him out of the fund in Court, together with the costs of the application (x).

— upon sequestration.

It has been already stated (a), that where sequestration, *per meum process*, are in possession of the lands or tenements in question in the cause, the appointment of a Receiver of the rents and profits will have the effect of discharging the sequestration (b) (1).

**Consequences  
of appoint-  
ment,**

— proceed-  
ings where the  
lands or tene-  
ments are in  
possession of  
party.

When a Receiver has been appointed of lands or tenements, it is the duty of any party to the record to deliver up to him the possession of such of the lands or tenements as may happen to be in such party's possession. If, however, the party should refuse to do so, the proper course to compel him is to obtain an order, upon motion, that he may, on or before a given day, deliver up the possession to the Receiver (c); and if upon service of such order (d) he refuses to deliver up the possession, the plaintiff may sue out a writ of assistance in the manner pointed out in the 1 Will. IV. c. 36, s. 15, Rule 19 (e). It is to be observed, that the person to es-

(f) *Davis v. The Duke of Marlborough*, 2 Swanst. 118. This must not be understood of Receivers appointed of the estate of an infant during his minority.

(u) *Lord Hutchinson v. Lord Macclesfield*, 2 B. & B. 55.

(x) *Sharp v. Carter*, 3 P. W. 379.

(y) *Boehm v. Wood*, T. & R. 345.

(z) *M'Leod v. Phelps*, Jan. 1838, 963.

(a) *Ante*, p. 1274.

(b) *Heyn v. Heyn*, Jac. 49; *Shaw v. Wright*, 3 Ves. 22.

(c) *Griffith v. Griffith*, 2 Ves. 401; 12th Order Aug. 1841; *ante*, p. 1250.

(d) In *Davis v. Duke of Marlborough*, 2 Swanst. 116, the order appointing the Receiver directed the Duke of Marlborough to deliver up possession to the Receiver.

(e) *Ante*, p. 1280. This appears to have been the ancient practice of the Court in the case of Receivers.

(1) *Atlas Bank v. Nahant Bank*, 23 Pick. 480, 488, 489, 490.

force the delivery of the possession to the Receiver, is the party obtaining the order, and not the Receiver himself.

Consequences  
of Appoint-  
ment.

Where the lands or tenements, or any of them, are not in the actual occupation of the party, the order for the appointment of a Receiver usually contains a direction that the tenants shall attorn to the Receiver, and shall pay their rents in arrear, as well as the growing rents, to such Receiver (*f*). Under this order, application should be made by the Receiver to the tenants to attorn, and if they, or any of them, refuse to do so, the party obtaining the order for the appointment of the Receiver, should serve them, or such of them as refuse to attorn, with a copy of the order for the appointment of the Receiver, and of the Master's report of having appointed him. He should also serve them with a notice of motion that they may be ordered to attorn within four days from the service of the order, or stand committed (*g*). Upon this motion, the parties in possession may appear, and inform the Court whether they are in possession as tenants or not (*h*); but if they do not appear, the order will be made, and must be served personally upon the tenants; and upon affidavit of service and non-compliance, the party prosecuting the contempt may obtain an order, as of course, for their committal to the Queen's prison, which is drawn up by the registrar, and delivered to the tipstaff *i*); or an attachment may be issued against the tenant under the 14th Order of August, 1841 (*j*).

— in the  
hands of  
tenants.  
Attornment,  
how enforced.

In *Reid v. Middleton* (*k*), which has been before referred to, appeared that the tenant in possession had not agreed to pay any specific rent, and in consequence, an order was made that occupation-rent should be settled by the Master, and that the tenant should pay the arrears and future payments of such occupation-rent.

Occupation-  
rent, in what  
cases fixed.

When a Receiver has been appointed, his possession is that of the Court, and any attempt to disturb it without the leave of the Court first obtained, will be a contempt on the part of the person making it. It was so settled in *Angel v. Smith* (*l*), where the rule was laid down, both with respect to Receivers and sequestra-

Examination  
*pro interesse*.

*f*) Ante, p. 1977, and vide *Simonds v. Lord Kinnaird*, 4 Ves. 747.

*g*) 1 Smith, 637; *Reid v. Middleton*, T. & R. 455.

*h*) Ibid.

*i*) 1 Smith, 57, ed. Edit.; Broad

*v. Wilkinson*, 9th June, 1831; R. L. for 1642.

*j*) Ante, p. 1277.

*k*) Ubi supra.

*l*) 9 Ves. 335.

Manner in which possession of Receiver contested.

Where Receiver has been appointed without prejudice.

Reference to inquire whether ejectment against Receiver should be defended.

tors, that their possession is not to be disturbed without leave (—) When, therefore, a party is prejudiced by having a Receiver in his way, the course has either been, to give him leave to bring an ejectment, or to permit him to be examined *pro interesse suo* (—) The rule that the possession of a Receiver is not to be disturbed extends even to cases in which he has been appointed *expressly without prejudice* to the rights of persons having prior estates and the individuals having such prior estates must, if they wish to avail themselves of them, apply to the Court either for liberty to bring an ejectment, or to be examined *pro interesse suo* (e); and this although their right to take possession is clear (p). In this respect, there is no distinction between possession by a Receiver, and that by sequestrators under a commission of sequestration (q); and the reader is therefore referred for information as to this subject to the part of this treatise in which the method to be pursued by persons who claim paramount to a sequestration has been pointed out (r).

It may be mentioned here, that where an ejectment was actually brought against a Receiver, although it was without the previous leave of the Court, the Court made a reference to the Master, to inquire whether it would be for the benefit of the parties interested, who were adults, that the Receiver should defend the ejectment and charge the expense in his accounts (s).

#### SECTION IV.

##### *Salary and Allowances (2).*

Salary, when fixed.

THE order referring it to the Master to appoint a Receiver, usually directs the Master to allow the Receiver a proper salary

(n) Brooks v. Greathed, 1 J. & W. 176.

(o) Vide Bryan v. Cormick, 1 Cox, 422.

(p) Anon. 6 Ves. 227.

(q) Brooks v. Greathed, 1 J. & W. 178; Gomme v. West, 2 Dick. 472.

(r) Ante, p. 1269.

(s) Anon. 6 Ves. 227.

(1) Where the property is legally and properly in the possession of the receiver, it is the duty of the Court to protect such possession, not only against violence, but also against suits at law. But if the property is in the possession of a third person, under a claim of title, the Court will not protect the officer, who attempts by violence to obtain possession, any further than the law will protect him; his general authority being unquestioned. Parker v. Browning, 8 Paige, 388; 2 Story Eq. Jur. § 833a, 833b, and note; Noe v. Gibson, 7 Paige, 513.

(2) For a full consideration of this subject, see Edwards, Receivers, 530.

ure and pains therein (*t*). The Receiver's salary, how- Salary when  
fixed.  
not generally fixed till the passing of the first account,  
Master allows him a *per centage* upon his receipts in his  
for his care and pains by way of salary.

usual allowance to a Receiver of the rents and profits of a —amount of.  
state, has generally been 5*l.* per cent. on the gross rental;  
ever, has been the *maximum*: and where the rental has  
considerable, a *per centage*, at a much lower rate, has  
wed, or a stated salary sufficient to compensate the Re-  
services (1).

*v. Croft* (*u*), an objection was taken to the allowance to  
iver, which had been made by the Master, of 5*l.* per cent.  
a gross sums which had been paid to him for the redemp-  
mortgages and annuities, and for annuities and interest  
rtgages, and Lord Langdale thought there was sufficient  
se to warrant a reference back to the Master to review  
t.

reference to the subject matter of the last case, it may be Where gross  
sums have  
been paid to  
him.  
d, that in *Haigh v. Grattan* (*x*), where a Receiver had  
ointed to get in the outstanding estate of a testator, the  
f the Rolls held that the Receiver had not such a vested  
collect the whole estate, as entitled him to prevent the  
ing paid into Court without passing through his hands,  
hat he might obtain his poundage, and made an order on  
on of some of the parties interested, that a debtor to the  
o was willing to pay the amount of his debt to the Ac-  
General at once, might be at liberty to do so.

bject of *per centage* proper to be allowed to a Receiver, Practice of  
Masters with  
respect to.  
f salary, has recently undergone investigation in *Day v.*  
ve referred to; and, in his judgment upon that case,  
gdale, M. R. who had thought it right to inquire of the

, p. 1977.  
av. 488.

(*x*) 1 Beav. 201.

atter of Kellogg, 7 Paige, 265; *Vanderheyden v. Vanderheyden*,  
57; *Matter of Roberts*, 3 John. Ch. 43; *Williamson v. Wilson*, 1

*rice v. White*, 1 Bailey Eq. 240, it was held, that a receiver who  
the duty assigned to him, is entitled to the usual commissions,  
hey appear to be more than a reasonable compensation for the ser-  
ered. In some instances they may be more and in some instances  
in adequate remuneration; but even this is preferable to the un-  
f suffering the rate of compensation to depend upon the discre-  
Master. Nor is it any ground for an exception to the general  
he business was conducted almost entirely by overseers and fac-  
uch as the receiver has incurred the responsibilities incident to  
agencies.



Allowances.

Masters in general what were the principles upon which they acted, and the practice adopted on this point in their several offices, thus states the result of his inquiries—"The Masters have each of them been good enough to furnish me with a certificate; and I find that there is no general rule which universally prevails as to the allowance to a Receiver. Where the receipts consist of rents of freehold and leasehold estates, 5*l.* per cent. upon the amount received, is most frequently allowed. If there be any special difficulty in collecting the rents, on account of the sums being extremely small or of the payments being very frequent, as weekly payments, then the allowance is increased; on the other hand, if there should be very great facility in receiving the rents, then less than 5*l.* per cent. is allowed. One of the Masters has certified to me a case where, after consideration, he allowed only 4*l.* per cent. for the receipts of rents and profits of freehold and leasehold estates. Another Master has certified to me a case in which the sum paid to the Receiver amounted to 300*l.* a-year for the first year; the Receiver was afterwards allowed 150*l.* only for a succession of years, which was afterwards reduced to 50*l.* a-year, for the receipt of the same rents; it cannot, therefore, be considered as an universal or general rule, that 5*l.* per cent. should be allowed even upon the receipts of rents and profits. It may be increased if there be any extraordinary difficulty, or diminished if there be any extraordinary facility in the collection."

"With respect to other receipts each Master considers himself bound to have regard to the degree of facility or difficulty there may be in receiving them. They have sometimes allowed 2 1-4*l.* per cent., but for gross sums of money this has been very much reduced, and 1 1-4*l.* per cent. has been allowed upon many occasions. It appears, therefore, that the Masters, as they ought, consider upon each occasion, what is fit or proper to be allowed, having regard to the degree of difficulty or facility experienced by the Receiver."

— for  
trouble,  
expenses, &c.

A Receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expenses he may have been put to in the performance of his duties (z) (1). The Court will not, how-

(z) Vide *Potts v. Leighton*, 15 Ves. 276.

(1) See *Williamson v. Wilson*, 1 Bland, 433.

The commissions allowed by law are intended to be a full compensation to the receiver for his personal services in the execution of his trust. He is not authorized to act himself as counsel in the business of his trust, so as to entitle himself to extra counsel fees for professional services, beyond the allowances provided in the fee bill to attornies, solicitors, &c. *Matter of the Bank of Niagara*, 6 Paige, 213.

sanction such allowances, where they are objected to, unless the Receiver has had the previous approbation of the Court, or of the Master, for what he has done (a); and upon this ground Lord Ham discharged an order of the V. C. of England, referring to the Master to review his report upon a Receiver's account, in reference to certain sums which the Receiver had claimed on account of journeys taken by him to France, for the recovery of property belonging to the estate before the tribunals there, but which the Master had disallowed (b). It is to be observed, however, that in *Malcolm v. O'Callaghan* (c) the result of the Receiver's accounts had been unfavorable, and that no benefit had accrued to the estate from the proceedings instituted; but it may be inferred from his Lordship's judgment, that "if success had attended the exertions of the Receiver, and he could have shown that such success had arisen from his presence in Paris," he would have ordered it "inequitable for the parties to take the benefit of the exertions without defraying the expenses which had attended them, although no previous authority for incurring them had been

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may be mentioned here, that in a case before Sir Anthony in Ireland, where the Receiver of a lunatic's estate had instituted proceedings, which, being wrong in form, he abandoned, afterwards took other proper proceedings which were successful; the Court refused to allow him the cost of the first proceedings, although the Master reported that the Receiver had acted *bona fide*, and ought to be allowed the costs (d). The proper method of objecting to a Master's report allowing the Receiver's salary, or other expenses or allowances, where the objection is to the principle on which he has proceeded, is by presenting a petition praying a reference back to the Master to review his report, or for liberty to take exceptions to it, as in the case of a Receiver's account of the taxation of costs (e).

Concerning salary or expenses.

#### SECTION V.

##### *Powers, Duties, and Liabilities of Receivers.*

When a Receiver has been appointed of lands and tenements, his duty is to obtain the possession of such of the estates as may

Possession of estates and tenements, how obtained.

*In re Ormsby*, 1 B. & B. 189.  
*Malcolm v. O'Callaghan*, 3 M.  
L.

(c) *Ubi supra*.  
(d) *In re Montgomery*, 1 Moll. 419.  
(e) *Ante*, p. 1591-2.

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be in the hands of any of the parties to the cause (1), and to obtain the attornment of the tenants of such of them as may let (2). If he is unable to accomplish this, by reason of the refusal of the party to deliver up possession of the estate, or of the tenants to attorn, he must report such refusal to the Solicitor of the party on whose application the order for the Receiver was made, in order that he may take the necessary steps to put the Receiver into possession or to procure the attornment of the tenants (3).

**Tenants to pay arrears.**

It is to be observed, that, by the terms of the order, the tenants are bound to pay to the Receiver not only the rents which are accruing at the time of his appointment, but any rents which may be then due and in arrear (f).

**Power to distrain.**

A Receiver has power, after the tenants have attorned to him, or have paid him rent, to distrain upon them for rents in arrear. Formerly an order was considered necessary to authorize such a course (g), but it seems to be now settled, that if the tenants have attorned, an order is unnecessary to enable a Receiver to distrain (h), unless the rents are more than one year in arrear, in which case an order was formerly considered necessary (i).

**Course of proceeding where there is any doubt as to the right to distrain.**

In *Pitt v. Snowden* (k), Lord Hardwicke said, that if there should be any doubt who had the legal right to the rents, then the Receiver, as he must distrain in the name of the person who has

(f) Ante, p. 1983.

(g) *Shelly v. Felham*, 1 Dick. 120; *Mitcheal v. Duke of Manchester*, 2 Dick. 787.

(h) *Pitt v. Snowden*, 3 Atk. 750; *Raincock v. Simpson*, 1 Dick. 120, (n).; *Hughes v. Hughes*, 1 Ves. J. 161; 3 Bro. C. C. 87, S. C. [Per-

kins's ed. note (1)]; *Brandon v. Brandon*, 5 Mad. 476.

(i) *Brandon v. Brandon*, 5 Mad. 473, but since this case the 6th Order of 1826 was issued, see next page; see also *Codrington v. Johnston*, 1 Beav. 524.

(k) 3 Atk. 750.

(1) A receiver is under no obligation to attempt to take property from the possession of a third person, or even from the defendant himself, by force, without an express order of the Court directing him to do so. *Fisher v. Browning*, 8 Paige, 388.

(2) See 2 Story Eq. Jur. § 833; *Sea Ins. Co. v. Stebbins*, 8 Paige, 555. He has no powers except such as are conferred on him by the order for his appointment and the course and practice of the Court. *Verplanck v. Mercant. Ins. Co.* 2 Paige, 452. Excepting where he is appointed under particular statutes, as in cases of proceedings against corporations, in which, in New York, he is a statutory assignee, vested with nearly all the power and authority of the assignee of an insolvent debtor. *Ib.* *Attorney-general v. Life & Fire Ins. Co.* 4 Paige, 224; *Edwards, Receivers*, 4. Persons appointed receivers or trustees in such cases, hold a power much larger and of a different character from that of ordinary receivers in a Chancery suit. See *Atlas Bank v. Nahant Bank*, 23 Pick. 489; S. C. 3 Metcalf, 581.

(3) As a general rule, a receiver appointed in a cause should not employ the solicitor of either of the parties in the suit to assist him in the discharge of his duties as a receiver. *Ryckman v. Parkins*, 5 Paige, 543.

that right, would very properly make an application to the Court for an order; this, however, cannot apply to cases in which there has been an attornment pursuant to the order, as by such attornment the legal right to the rent is given to the Receiver, who must then distrain in his own name. Power to set, let, and manage.

The order of appointment, as we have seen (1), generally contains a direction that the Receiver shall set and let the estate with the approbation of the Master. It seems that, formerly, it was necessary, before the Receiver could set or let any part of the estate, to have an order to sanction his so doing, which was obtained as of course (m); but this power is now always given by the order under which he is appointed. Power to set and let,

Under the old practice also, a Receiver could not act in any respect in the details of the management of the estate, without a special order was first obtained directing the Master to inquire into and report upon the propriety of the proceeding contemplated, but this has been obviated by the 64th Order of 1828, which directs, "that in every order directing the appointment of a Receiver of landed estates, there be inserted a direction that such Receiver shall *manage*, as well as let and set, the estate with the approbation of the Master; and that in acting under such an order as shall not be necessary that a petition shall be presented to the Court in the first instance; but the Master, without special order, shall receive any proposal for the management or letting of the estates from the parties interested, and shall make him report thereon, which report shall be submitted to the Court for confirmation in the same manner as is now done with respect to reports on such matters made upon special reference, and until such report be confirmed, it shall not give any authority to the Receiver." — and manage.  
How exercised.

The provisions of this Order have been extended to enable the Master to carry out the provisions of the Tithe Commutation Act, where an estate is under the management of a Receiver, for an Order of March, 1839, directs — "That in all cases where a Receiver of a landed estate is appointed with a direction that such Receiver shall manage as well as sell and let, with the approbation of the Master, and such Receiver shall, under the provision of the Act for the Commutation of Tithes in England and Wales (6 & 7 Wm. IV., c. 71, sec. 12) be deemed for the purposes of the said Act, an owner of such tithes and lands as therein mentioned, jointly with any other person, the Master shall, without

(1) Ante, p. 519-20.

(m) Neale v. Bealing, 3 Swanst. 304, (n).

Power to set,  
let, and  
manage.

May give no-  
tice to quit,

but cannot  
bring eject-  
ment.

Cannot incur  
expenditure  
upon estate,  
without leave.

Power as to re-  
pairs.

Outstanding  
estates how  
got in.

special order, receive any proposal regarding the execution of the said Act, as to such tithes and lands, and shall make his report thereon, which report shall be submitted to the Court for confirmation in the same manner as is now done with respect to reports under the 64th Order of 1828. And until such report be confirmed, it shall not give any authority to the receiver."

As connected with the management of the estates, it is to be mentioned, that although a Receiver has power, in the case of a tenant from year to year who has attorned to him, to give him notice to determine his tenancy (n), he cannot bring an ejectment, or take any other step towards turning him out of possession, without the Master's sanction (o).

The Court will not permit a Receiver to lay out more than a very small sum at his own discretion; it is improper, therefore, for a Receiver, as well as for a guardian, to do any act which may involve the estate in expense, without first applying (p) to the Master for his sanction. Upon this ground, if an ejectment is brought against a Receiver, or an action for any thing done by him in the performance of his duty, he must not attempt to defend it without previously applying to the Master for his directions; and in *Swaby v. Dickon* (q), where the Receiver, without the approbation of the Master, or the authority of the Court, defended actions arising out of a distress made by him upon a tenant of the estate, for rent, the Court refused to allow him his costs of the action.

So likewise, although a Receiver may lay out small sums of money in customary repairs, or may allow the same to the tenant, the Court is not in the habit of permitting either Receivers or committees to apply the trust funds in repairs, to any considerable extent, without a previous application to the Master (r).

Formerly the Court acted strictly upon this rule, and never permitted a Receiver to lay out any money whatever, on the estate, without a previous order; but now, where the Receiver has laid out money, in repairs or otherwise, without such previous order, it is usual to refer it to the Master to see if it has been beneficial to the estate, and, if it be found to be so, the Receiver will be allowed the money so laid out (s).

When a Receiver is appointed to get in outstanding personal property, it is his duty to collect all that he can get at; to enable him to do which, the order, under which his appointment is made,

(n) *Doe v. Read*, 12 East, 59.

(r) *Atty.-Gen. v. Vigor*, 11 Ves.

(o) *Wynne v. Lord Newborough*,  
1 Ves. J. 164; 3 Bro. C. C. 88, S. C.

563.

(p) Under the 64th Order of 1828.

(q) 5 Sim. 629.

(s) *Tempest v. Ord*, 2 Mer. 55;  
*Blunt v. Clitherow*, 6 Ves. 799 [Sum-  
ner's ed. note (s)].

y directs the parties to deliver up to him all securities in their possession for the outstanding debts and effects, together with all papers, and writings relating thereto (t). If the parties in their hands such securities or papers are, should refuse to deliver up, the Receiver should give notice of such refusal to the Court obtaining the Receiver, in order that he may take the necessary steps for enforcing the order.

Suits by Receiver.

It is to be observed that, by the terms of the order, the Receiver is empowered, in case it should be necessary, to put any of the parties in suit, to make use of the name of the party to whom such sum is legally due (t).

The Receiver must not, however, bring any action or commence a suit for the recovery of such debt, without first obtaining the sanction of the Master to the proceeding. By the order of appointment it is, as we have already seen (u), provided, that the party whose name is used is to be indemnified, out of the estate, of any loss that he may incur, by the use of his name, out of the debts and effects, — for this purpose he must apply to the Court for sanction in the cause (1).

Must be sanctioned by Master.

Where the Order directs that the Receiver shall keep down the interest on the list of incumbrances reported due by the Master, he must of course comply with that order, taking the necessary receipts upon payment; and it is to be remembered that, in passing his accounts, the Receiver will be subject to the same rules that all other accounting parties are subject to (z), and that he will only be allowed to charge himself by affidavit, as to those payments which are more than forty shillings; — for all other payments he must produce receipts or vouchers.

Interest on incumbrances how kept down.

It may be mentioned in this place, that a Receiver will be responsible for any loss which may be occasioned to the estate from his wilful default; therefore if he places money received by him in his hands, the Court will oblige him to pay it back.

In what cases charged with losses.

Ante, p. 1977.  
Ante, p. 1977.

(u) Ibid.  
(z) Vide ante, p. 1424.

Where the property is in the possession of a third person, who claims to retain it, the receiver must either proceed by suit against him, or the plaintiff must make him a party to his suit, and apply to have his responsibility extended to the property in his hands, so that an order may be made for its delivery, and may be enforced by process of contempt. Parker v. The Receiver, 8 Paige, 388. A receiver can neither be bound by any implied waiver, nor can he express any legal technical defence, or abandon an equitable one. McEvers v. The Receiver, 1 Hoff. Ch. Rep. 172. Nor has a receiver power to dispense with the conditions of a policy. Ib.

In what Cases charged with Losses.

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In the case of failure of banker.

Where he parts with his control over the fund.

When he deposits money for his own credit.

Where he does not pass his accounts regularly.

to pay it out of his own pocket (y). But if where rents received are large, and he, as a necessary precaution, for the purpose of remitting it to London in bills rather than in specie, pays it to a tradesman who is in credit at the time, and takes bills from him, and the tradesman afterwards fails, he will not be affected (z).

So also if he deposits the monies with a banker for safe custody, he will not be answerable for the failure of the banker, if the monies are not mixed with his own monies, and they were *in fide* deposited for safe custody under circumstances in which they could not properly have been paid into Court (a).

A Receiver, however, will be held answerable for the loss occasioned by the failure of a banker with whom he deposited moneys for security, if the deposits be made in such a way that he put with the absolute control over the fund; therefore, where a Receiver paid the sums which he had received into a banking-house, to the joint account of his sureties, under an arrangement with them, that all drafts for the sums so paid in should be written by one of the sureties and signed by himself, it was held by Lord Brougham, and afterwards by the House of Lords upon appeal, that the Receiver was liable to the loss occasioned by the failure of the banking-house (b).

The case will be the same if the Receiver deposits the money with, or remits it to, a banker for his own credit and use, and not to a separate account for the trust, and the banker afterwards fails (c) (1).

It is the duty of a Receiver to pass his account annually, unless otherwise directed by the order for his appointment, which sometimes, especially in the case of Receivers of personal estate, directs the Receiver to pass his accounts half yearly (d).

If a Receiver does not regularly pass his accounts, he is liable to be deprived of his salary, and also to be charged with interest on the balances in his hands; and in order to enforce this liability, an Order was made, on the 15th Dec. 1792 (e), whereby the Masters are directed, on the second seal after Trinity Term in every year, to certify to the Lord Chancellor, Lord Keeper, or Lords

(y) Knight v. Lord Plymouth, 3 Atk. 480; 1 Dick. 120, S. C.; vide etiam, Rowth v. Howell, 3 Ves. 565.  
(z) Ibid.  
(a) Salway v. Salway, 4 Russ. 60.  
(b) Salway v. Salway, 2 R. & M. 215; 9 Bligh, N. S. 181, sub nomine White v. Baugh.  
(c) Wren v. Kirkton, 11 Ves. 377.  
(d) Seton on Dec.  
(e) Beames, Ord. 454.

(1) A receiver is bound to keep the property so that it can be easily traced, delivered up, or accounted for. Williamson v. Wilson, 1 Bland, 436.

Commissioners for the Custody of the Great Seal for the time being, the state of the several Receivers' accounts in their respective offices; and, by a subsequent Order, dated the 23rd April, 1796 (*f*), after stating that it appeared from the returns made by the Masters in Chancery in pursuance of the last-mentioned Order, that many Receivers of estates appointed by this Court, had not been so punctual in passing their accounts, and paying their balances due thereon, as they ought to have been, it is ordered that the several Masters of the Court should, thereafter, fix the days upon which all Receivers, in their respective offices, shall annually procure their accounts to be delivered unto the Masters, and also the days upon which such Receivers shall pay the balances appearing due on the accounts so delivered in, or such part thereof as the Master shall certify proper to be paid by them. And it is further ordered, that, with respect to such Receivers as shall neglect to deliver in their accounts, and pay the balances thereof at the times so to be fixed for that purpose, as aforesaid, the several Masters to whom such Receivers are accountable, shall from time to time, when their subsequent accounts are produced to be examined and passed, not only disallow the salaries therein claimed by such Receivers, but also charge them with interest after the rate of 5 per cent. per annum (*g*) upon the balances so neglected to be paid by them during the time the same shall appear to have remained in the hands of such Receivers. And that every Receiver, acting under the authority of this Court, shall, in each year, procure his annual accounts of receipts and payments respecting the estate entrusted to his care, to be examined and settled by the Master whose duty it may be to inspect the same, within the space of six months next ensuing the time appointed by such Master for the delivery of such account into his office, as is hereinbefore directed. And in case any Receiver shall, at any time hereafter, neglect so to do, a certificate of every such default is hereby required from the Master in whose office such neglect or default shall happen.

In what Cases charged with Interest.

General Order of 1796.

It is to be observed that the above order authorizes the Masters to fix the times for Receivers bringing in *annual* accounts only, and that upon the first appointment of the Receiver. To remedy the inconvenience experienced from this circumstance, the 63rd Order of 1828 has provided, "That the Masters, in acting upon the Order of the Court of the 23d of April, 1796, shall be at liberty, upon the appointment of a Receiver, or at any time subsequent thereto, in the place of annual periods for the delivery of

Amended by Ord. 1828.

(*f*) Ibid. 461; 15 Ves. 278.

(*g*) Beames's Ord. 462.



In what Cases  
charged with  
Interest.

In what man-  
ner interest to  
be computed.

the Receiver's accounts and payment of his balances, to fix *either longer or shorter periods, at his discretion*; and when such other periods are fixed by the Master, the regulations and principles of the said Order, shall in all other respects be applied to the said Receiver."

Acting upon the Order of the 23rd April, 1796, Lord Eldon directed that a Receiver of the personal estate of a testator not passing his accounts and paying in his balances, should be deprived of his salary. He also directed him to be charged with interest, but not upon each sum, from the moment at which it came into his hands, but in the same manner that an executor is charged with interest, *i. e.*, by making yearly or half-yearly *rests* in the account (*h*) (1). And it appears that this rule will be applied as well in cases where the Receiver has been discharged as where he is still in office; therefore, where a Receiver who had been discharged had not paid in his balance, he was ordered, upon motion, to pay in the same, and also the amount allowed for his salary, together with interest on both sums, at 5 per cent. from the day appointed by the Master, and the costs of the motion (*i*).

It is to be observed, that, in *Fletcher v. Dodd* (*k*), Lord Longborough said that he would make a Receiver pay interest, if he keeps money in his hands a quarter of a year after it ought to have been paid into Court: and in that case, notwithstanding it appeared that he had passed his account before the Master, and all the parties had declared themselves satisfied, his Lordship, under the peculiar circumstances of the case, directed the Master to inquire what money he had received from time to time, and how long he had kept it in his hands.

— or differ-  
ence in price  
of stock.

In ——— *v. Jolland* (*l*), Lord Eldon appeared to think, that if such a case should be brought before him, he should direct a Receiver to make good any loss which might be occasioned from

(*h*) *Potts v. Leighton*, 15 Ves. 273 [Sumner's ed. note]; vide etiam — *v. Jolland*, 6 Ves. 72; *Fletcher v. Dodd*, 1 Ves. J. 85 [Sumner's ed. note (*a*)].

(*i*) *Harrison v. Boydell*, 6 Sim. 211. (*k*) 1 Ves. 85. (*l*) 8 Ves. 73. The name of this case is *Frotherstone v. Jolland*.

(1) Where a receiver improperly retains a balance in his hands, and does not regularly pass his accounts, he will have to pay interest on the amount if the Master should deem it just, unless he can show a special case of exemption. *Harman v. Foster*, 1 Hogan, 318; In *Re Carter*, 3 Paige, 146; In *Re Seaman*, ib. 409. The Court is strict in requiring compliance with the rule to account. *Edwards, Receivers*, 482.

As to charging interest against agents, receivers, trustees, &c. and the mode of computing it, see ante, 1508, 1509, notes, and cases cited.

difference in the price of the funds between the time when the Receiver's balances were paid in and the time when they ought have been paid in.

In what Cases charged with Interest.

In *Hicks v. Hicks* (m), where a Receiver had been appointed during the minority of an infant who had no guardian, and was directed to place out the surplus of the rents and profits when they would amount to a competent sum, on government or other securities, but omitted so to do, Lord Hardwicke directed that he should pay interest at the rate of four per cent. on the surplus rents and profits, from the date of the decree till the infant came of age, although the infant, two days after he came of age, settled accounts with the Receiver, who delivered up his vouchers, and gave him copies of all the accounts passed by the Master, &c.

Receiver of infant's estate charged though he had settled accounts

In that case, Lord Hardwicke held that it was no excuse for the Receiver to say — that the buildings and farms were in a ruinous condition, and the tenants constantly breaking, and that it was therefore necessary for the Receiver to keep a balance in his hands for re-building and repairing, or for stocking empty farms; because it is not to be supposed that he could, in such matters, exhaust the funds received (n). He also held, that there was no force in the argument derived from the fact of the Master having given no directions for the investment of the money, because "it was the duty of the Receiver to remind the Master to lay out the surplus rents as often as they amounted to a competent sum" (o). It is to be observed, however, that, in the above case, the infant, had no guardian, and that where he has a guardian, if the Receiver settles accounts with such guardian, he will not be obliged to account over again with the infant when he comes of age (p).

It may be remarked in this place, that although a Receiver is legally bound, by his recognizance, to pass his accounts yearly, he may at any time apply to the Court to pay in the monies in his hands, and that if in the interval between passing his accounts, he receives sums of such an amount as to make it worth while to pay them out, he ought to apply for an order to have them paid into Court, that they may be then made productive for the benefit of the estate (q).

Receivers may apply to pay in balances in their hands at any time.

(m) 3 Atk. 274.

(n) Ibid.

(o) Ibid.; vide *Earl of Lonsdale v. Church*, 3 Bro. C. C. 41.

(p) *Clavering's case*, Prec. in

Chan. 535; 2 Eq. Ca. Ab. 9, c. 7. S.C.

(q) *Shaw v. Rhodes*, 2 Russ. 539;

vide etiam, *Hand's Practice*, p. 183.

Where an order of this nature may be found.

## SECTION VI.

*Of Receivers' Accounts.*

Bringing in of,  
how compelled.

IF a Receiver does not bring in his account within the time limited for that purpose (r), the party desirous of having it brought in, may take out first a general warrant, and then a peremptory warrant, for him to bring in his account (1); and, upon default, the Master certifies, and upon the certificate being filed, the party is entitled, as of course, to an order that he do bring in his account within four days or stand committed. Upon an affidavit of personal service of the order, and the Master's certificate that no account has been brought in, the order is made absolute upon motion of course, and the Receiver is turned over to the Queen's Prison.

Course where  
Receiver does  
not proceed  
with his ac-  
counts.

If the Receiver brings in his accounts, but fails to proceed upon them, the party prosecuting the cause takes out and serves, on the Receiver's solicitor, a warrant to proceed on the accounts; if the Receiver does not attend, the Master's allows the sums wherewith he has charged himself, and disallows his payments for want of being vouched (s).

Form of Re-  
ceiver's ac-  
count.

The Receiver's account comprises the situation of the estate, the names of the tenants, arrears of rent of the preceding year, rents due, rents received, arrears due; and lastly observations, &c. The money paid and allowances made to tenants, and the Receiver's salary, are then stated and regularly disposed in columns.

In what man-  
ner passed.

This account is passed by the Receiver leaving a copy at the Master's office, and taking out a warrant upon leaving, and warrants to proceed, serving them upon the solicitors for the parties interested, and attending and producing proper vouchers and receipts for the monies paid, which the Master should mark as produced: the Receiver's bill of costs, for passing his accounts, should also be brought in, and the usual warrants "on leaving" and "to settle" should be taken out, served, and attended. The

(r) Ante p. 1990.

(s) Ibid.

(1) A receiver cannot be compelled to account and show his books to a party in a suit. He is to account to the Court only. *Musgrove v. Nash*, 3 Edw. 172; *Edwards, Receivers*, 506.

For a full view of the practice on accounting by a receiver, see *Edwards, Receivers*, 493, et seq. ch. 14.

count is entered in a book kept at the Master's office, a duplicate of which, containing a copy of the account, is entered in another book, which the Master's clerk delivers out to the Receiver after the Master has made his report. The account must be verified by the affidavit of the Receiver, which follows each entry account in the Master's book. The Master will then make a report of passing the account, copies of which must be taken by the Receiver and the solicitors for the parties interested, and usual warrants "*on preparing*" "*to settle*" and "*to sign*," must be taken out by the Receiver, served and attended. The report, which requires no confirmation by the Court (t), must be filed at the Report Office, and an office copy taken (u).

In what manner passed.

The balance in the Receiver's hands must be paid into Court immediately after the Receiver's account is reported by the Master, for this purpose *no new order is required*: the Receiver should apply to the Accountant-general for the usual direction to pay the balance into the Bank, and should leave the order under which his appointment is made and the office copies of the report appointing him; the order should always provide for payment of the Receiver's clear balance into the Bank. This order, with the Master's report upon passing the Receiver's account, will be sufficient for the Accountant-general, and he will give the requisite directions to the Bank (x).

Payment of Balance.

When the order for appointing a Receiver does not provide for payment of his balances into the Bank, the Receiver will not be allowed to avail himself of the omission, and to keep a balance in his hands without interest, under a pretence of waiting for some opportunity in the cause to obtain an order upon him for payment; he must, upon his own application, to obtain an order for that purpose, and that the costs thereof may be allowed him by the Master on his next account, and, unless he does so, the Court will charge him with interest (y).

Where the order of appointment does not provide for it.

The course of proceeding to enforce payment of the balance of a Receiver, is, in the first instance, by obtaining an order upon the Receiver for payment, of the balance reported due, on a day to be named (z); for which purpose, an application for an order must be made by motion upon notice, supported by the Master's

How enforced. — by commitment.

(x) Cowper v. Earl Cowper, 2 P. 115. 729.

(y) 1 Turn. & V. 468.

(z) 1 Turn. & V. 469.

(y) Potts v. Leighton, 15 Ves. 274.

This order should be applied for on notice to the parties in the cause.

(z) Davies v. Calcraft, 14 Ves. 143.

Payment of  
Balance.

report; and the order be drawn up, passed, entered, and served personally upon the Receiver. If he absconds, an order must be obtained, that service by leaving the order for payment at his dwelling with one of the family may be substituted (a).

How enforced.

It is to be observed, that to enforce the payment of a Receiver's balance by committal, there must formerly have been three orders: the first merely directing the balance to be paid by a particular day, which, as above stated, must have been personally served; and the second, or order *nisi*, that he might pay it within a certain limited time, viz. a week, or stand committed, (which second order was necessary though the Receiver had appeared upon the motion for the first order and prayed for time (b).)

By attach-  
ment.

After the second order or order *nisi* had been served, there must have been, if the balance were not paid within the time limited, a third order for a committal. Now, however, there seems no reason why an attachment should not issue against a receiver under the 11th and 15th (c) Orders of August, 1841, upon his disobedience to the first order above stated.

— When  
Receiver dies.

It is to be observed, that, where a Receiver dies, the Court has no jurisdiction to order, in a summary way, that his executor shall bring in and pass his accounts, and pay the balance found due out of his assets (d). The proper course, in such a case, if the balance is not ascertained so that the recognizances may be put in suit, is to file a bill against his personal representative for an account; but this course may be avoided, if the representatives of the Receiver will consent to an order to pass the Receiver's accounts and to pay the balance (e).

— by put-  
ting his recog-  
nizances in  
suit.

When the Receiver's recognizances are to be put in suit, an order must be obtained to authorize it, otherwise the names of the Master of the Rolls and of the Master with whom the recognizances are entered, cannot be made use of (f). This order is usually obtained upon motion, of which notice must be given to the Receiver and if the sureties are to be proceeded against, notice of the motion must also be served upon them.

When the order has been obtained it must be taken to the Bag Office, where the following proceedings will be adopted:

(a) 1 Turn. & V. 470, and ante, p. 1250.

(b) Davies v. Calcraft, ubi supra.

(c) Ante, p. 1252 and 1277.

(d) Jenkins v. Briant, 7 Sim. 171.

(e) See in Littleboy v.

(f) 1 Smith's Ch. Pr. 646.

(g) The author is indebted following statement of the proceedings upon a Receiver's recognizances, to Mr. Abbot of the Bag Office, vide etiam, Curs. Cas.

By the recognizances entered into by Receivers and their sureties, they, the cognizors, acknowledge themselves to be indebted to the cognizees (usually the Master of the Rolls and the senior Master of the Court) in certain sums of money to be paid on certain days therein mentioned; in default of which they will and agree that the said sums shall be levied and recovered of them, their heirs, executors, and administrators, and of all and singular their lands and hereditaments, goods and chattels; the recognizance however is subject to a condition for making it void if the Receiver shall duly account for the rents and profits of the estate which he is appointed Receiver.

Payment of  
Balance.



When these recognizances are inrolled they are perfected, and being then acknowledgments of debts upon record, are much like judgments at Law, and have been sometimes so called (A). However, though the Receiver makes default in not performing a condition of the recognizance, execution is not to be sued out, but the recognizance to be put in suit till the parties interested in the estate have obtained an order of the Court for that purpose.

Order must  
first be obtain-  
ed.

This being done, the course of proceeding against the cognizees is by *scire facias* requiring them to show, if they have anything to say, why the cognizee should not have execution. This writ, in personal actions, is given by the Statute of Westminster the 2nd, — (13th Edward the 1st, c. 45); for at Common Law it lay only on judgments in real actions; and in personal actions, when debt and damages were recovered, if the judgment was given above a year's standing, the plaintiff had no remedy against the defendant but by new action of debt on his judgment.

*Scire facias.*

The words of the Act are these — “ Because that of such things as ought to be recorded before the Chancellor and the Justices of the King's Court have record and be inrolled in their Rolls, process of plea might not to be made by summons, attachments, essoin, and other solemnities of the Court, as hath been used to be done by bargains and covenants made out of the Court. It is to be observed, from henceforth, that those things which are inrolled before them at have record, or contained in fines, whether they be contracts, covenants, obligations, services, or customs acknowledged, or other things whatsoever inrolled, wherein the King's Court without offence of the law and custom may execute their authority, from henceforth they shall have such vigor that hereafter it shall not need to plead for them, but when the plaintiff cometh to the King's Court, if the recognizance or fine levied, be fresh (that

(A) 2 Bulstr. 62.

Proceedings  
upon Recognizance.

is to say) levied within the year, he shall forthwith have a writ of execution of the same recognizance made; and if the recognizance be made or the fine levied of a further time passed, the Sheriff shall be commanded that he give knowledge to the party of whom it is complained, that he be before the justices at a certain day to show, if he have any thing to say, why such matters inrolled or contained in the fine ought not to have execution; and if he do not come at the day, or peradventure do come, and can say nothing why execution ought not to be done, the Sheriff shall be commanded to cause the thing inrolled or contained in the fine to be executed."

Must be directed to the Sheriff of Middlesex in the first instance.

Alias and pluries S. F. into other countries.

Upon return.

The record of the recognizance, or rather the judgment, being in Middlesex, the first *scire facias* is to be directed to the Sheriff of that county, although the cognizors live in other counties; and, upon a *nihil* returned, an *alias scire facias* issues into the county or counties where the cognizors, their heirs, executors, or administrators live, or where the land of a deceased cognizor lies, in the case happens to be.

Thus if the Sheriff of Middlesex returns a *nihil* as to one of the cognizors, a *mortuus* as to another, and a *scire feci* as to the third, in this or the like case you proceed against them separately, by issuing an *alias* against the cognizor returned *nihil*, another against the heir and tenants of the deceased cognizor, and a third against the cognizor who has been warned and a *scire feci* returned, you give a rule with the Six Clerks to this effect:

Rule to plead.

Halford } Unless the defendant answer on the morrow of  
v. } the Holy Trinity next to come, let judgment be  
Creed. } entered.

Judgment where cognizors do not plead.

If the party against whom this rule is given does not appear and plead by the time the rule is out, you sign judgment and issue execution.

Execution.

The process to be issued in execution is either a *capias ad satisfaciendum*, a *levari facias*, or an *elegit*.

— by *elegit*.

If an *elegit* is sued out, it must be returned, because an inquisition is to be taken upon it by the Sheriff, whereby the Court may judge of the sufficiency thereof; and, when executed, returned, and filed, the plaintiff shall have no other execution (h); but he may have as many *elegits* into as many different counties as he thinks fit, and execute all or any of them at his pleasure.

Where cognizors plead.

If the cognizors, their heirs, executors, or administrators, appear and plead, you proceed and go to issue according to the rules of the office, make up and seal the record, and transmit it into the

(h) 1 Levinz, 92.

of King's Bench to be tried, as in the case of other proceedings; and when the record is so transmitted, it remains and judgment is entered up upon it, as upon a record of court (i). Proceedings upon Recognizance.

may be mentioned, that, in *Walker v. Wild* (k), where a receiver absconded and the proceedings were taken upon his recognizance, one of the sureties applied for and obtained an order for a reference to the Master, to see what was due from the receiver, and that he (the surety) might be at liberty to pay in the amount by instalments, so as such amount did not exceed the recognizance, and for a stay of the proceedings in the mean time, at the Court made the order, upon the surety paying the costs of the motion and of the subsequent proceedings in consequence of it. Upon what terms stayed.

to be noticed, that, if there is any proceeding at Law upon recognizance, the penalty of the recognizance is the debt for the execution will be issued (l). The Receiver, therefore, and sureties, if they wish to avoid the consequences of the forfeiture of the recognizance, must apply to the Court to stay the proceedings upon his paying in the amount actually due (m); and it is from the judgment of Lord Eldon, in *Dawson v. Raynes* before referred to, that even the sureties will not be relieved from the effects of the recognizance, unless they pay in all that the Receiver himself could have been required to pay (n). In this case, the Vice-Chancellor was of opinion that the sureties were not liable to pay the interest on the Receiver's balance, as the Receiver had been ordered to pay; but Lord Eldon, the case being brought before him by appeal, held the contrary to be that, where the principal debtor is obliged to pay, there can be no equity that the surety should not pay the

recognizances entered into by the Court, for any other purpose than that of receiving the rents and profits of estates, are proceeded in the same manner.

Recognizances between party and party, or the payment of sums of money, are sometimes, but not often, made by acknowledged and enrolled in the Court of Chancery, and if they are to be prosecuted by writ in the same manner, with difference, that as they are not made into by order of the Court, the Court does not give any order for putting in a bill.

Writs given to the King in matrimony are likewise prosecuted by *scire facias*, but those bonds being prepared and in the keeping of the Clerk of the Custodies, the first writ is issued by him; this writ being returned, and filed in the Petty Bag, the subsequent proceedings are the same as in the case of recognizances above mentioned.

(k) 1 Mad. 528.  
(l) Vide the certificate of the Judge of K. B. in *Dawson v. Raynes*, 2 Russ. 466-468.  
(m) Vide *Walker v. Wild*, 1 Mad. 529.  
(n) Ubi supra.

(o) Vide *Gereerside v. Benson*, 3 Atk. 248.



Proceedings  
upon Recogni-  
zance.

interest in default of the principal. Under the peculiar circumstances of the case, however, viz. the Receiver having been bankrupt, with the knowledge of all parties, for a considerable length of time, during which no steps were taken to compel the passing of his accounts, his Lordship affirmed the Vice-Chancellor's order.

It may be mentioned here, that if the surety of a Receiver has paid any thing on his account, for the benefit of the estate, he is entitled to be indemnified out of the balance due to the Receiver (*p*).

## SECTION VII.

### Discharge of

At whose re-  
quest.

Not upon his  
own applica-  
tion.

WHEN a Receiver has been appointed, and has given security, he cannot be discharged upon his own application, without showing some reasonable cause, by affidavit, why he should put the parties to the expense of a change (*q*) (*1*).

So, also, with regard to the sureties, it has been laid down by Lord Hardwicke, that if people voluntarily make themselves bail or sureties for another, they know the terms; and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it;—no regard, therefore, is due to their application, unless for the benefit of the parties in the cause, or something of that sort (*r*).

*Secus*, on the  
ground of ill  
health.

An instance of a Receiver being discharged on his own application, (on the ground of ill health,) may be found in *Richardson v. Ward* (*s*), in which case he was not only discharged and his recognizance ordered to be vacated, but he was allowed, although this part of the application was opposed, to retain his costs "of the application, and incidental thereto," out of the balance in his hands.

Continuance  
of.

A Receiver is generally continued till the decree, but if the right of the plaintiff ceases before that time, the Receiver may be

(*p*) *Glossup v. Harrison*, 3 V. & B. 134; *Coop.* 61, S. C.  
(*q*) 2 *Harr.* (ed. Newl.) 503.

(*r*) *Griffith v. Griffith*, 3 Ves. 400.  
(*s*) *Mad. & Geld.* 266.

(1) On a final and full account, a receiver, or his representatives, may be discharged and his bond cancelled. *Williamson v. Wilson*, 1 Bland, 439.

discharged, and cannot be continued at the instance of a defendant; upon this ground, Lord Eldon determined, in *Davis v. The Duke of Marlborough* (t), that where the plaintiff had been satisfied by the payment of his demand, the order for the Receiver must be discharged, although the discharge was opposed by two creditors having prior annuities to the plaintiff's; his Lordship observed, "I apprehend that with the right of the plaintiff to have a Receiver, must fall the rights of the other parties; it would be most extraordinary, if, because a Receiver has been appointed on behalf of the plaintiff, any defendant is entitled to have a Receiver appointed on his behalf" (u).

Continuance  
of Receivers.

Where plaintiff's right has  
ceased.

In a recent case, in which a Receiver had been appointed in a suit for the removal of trustees, and the appointment of new ones, upon the ground of misconduct on the part of one, and of age and infirmity on the part of the other, upon new trustees being appointed, in pursuance of the decree, an application was made on the part of the plaintiff to discharge the Receiver, on the ground that the new trustees were willing to act; and the Master of the Rolls, Lord Langdale, made the order, although it was opposed by some of the defendants, who were beneficially interested in the property as legatees, upon the trustees undertaking, without entering into recognizances, to account before the Master, half yearly, in the same way as the Receiver (x).

Upon the ap-  
pointment of  
new trustees.

The appointment of a Receiver, made previous to a decree, will be superseded by it, unless the Receiver is expressly continued (y). A Receiver, however, is never discharged by decree; but the application for his discharge is usually made by motion, notice whereof should be served on all parties, and the order runs thus, "That the Receiver be discharged from being such Receiver, and that he do forthwith (z) pass his final account, and pay the balance reported due into the Bank, or to the person entitled to receive it;" and upon such payment of the said balance, the recognizance entered into by the Receiver and his sureties is ordered to be vacated, and the proper officer is ordered to attend the Master of the Rolls with the record of the recognizance for that purpose. An office copy of the recognizance should be procured from the Clerk of Inrolments, and left with the Registrar at the time of bespeaking the order, that the same may be correctly

Receiver sup-  
erseded by  
decree.

Application  
for.

(t) 2 Swanst. 108-168.

(u) Ibid.; see vide *Largau v. Bowen*, 1 Sch. & Lef. 296.

(z) *Bainbridge v. Blair*, 3 Beav. 422.

(y) Vide *Gibson v. Lord Montfort*, Seton on Dec. 330.

(z) *Gilbert v. Whitmarsh*, 24th Feb. 1818; coram Leach, V. C., 2 Mad. Ch. Pr. 298, ed. 1837.

Under 38 Geo. III. c. 8. stated. Upon the Receiver's solicitor leaving the order, and the Accountant-general's certificate of the balance being paid in by the Receiver, or the affidavit of the payment of the balance, the party entitled with the Clerk of Inrolments, he will stamp the Master of the Rolls, and get the recognizance vacated, a note whereof will be signed by his secretary on the margin of the order (a). Care should be taken that the recognizance be noted, otherwise, if a material error should afterwards be discovered in the Receiver's account, the money may be recovered (b).

Under the 38 Geo III. c. 8.

It may be mentioned in this place, that where, in consequence of the absence abroad of an executor, a Receiver had been appointed under the 38 Geo. III. c. 8, s. 8 (c), and administration was afterwards granted under the same Act to another person, Lord Eldon held that the Act was defective in not providing for the discharge and accounting by the Receiver under such circumstances, and he therefore thought the best thing he could do, was to refer it to the Master to reconsider the appointment of a Receiver, regard being had to the circumstance of administration having been granted.

## SECTION VIII.

### *Liabilities and Rights of Sureties.*

Discharge of sureties.

THE sureties of a Receiver cannot be discharged at their own request; where, therefore, an application was made to discharge a Receiver on the ground of misconduct, and the sureties joined in the application, Lord Hardwicke held that no regard was to be had to their application, unless it was for the benefit of the parties in the cause, or something of that kind — "for if people voluntarily make themselves bail or sureties for another, they know the terms, and will be held very hard to their recognizance, and not discharged at their request to have new sureties appointed, for then there would be no end of it" (c).

— on their own request;

But although the general rule is not to discharge the surety of a Receiver on his own application during the continuance of the Receivership, such rule will yield to circumstances, — "as where

(a) Ex relatione Mr. Rogers of the Registrar's Office.  
(b) 1 Turn. & V.

(c) Ante, 253.  
(c) Griffith v. Griffith, 2 Ves. 400; vide Gordon v. Calvert, 2 Sim. 253.

underhand practice is proved, and the person secured shown to be connected with such practice" (d). Extent of Liability.

It seems that where a surety does procure his discharge during the continuance of the Receivership, the Receiver must enter into a fresh recognizance (e). Effect of.

With respect to the amount of a Receiver's liability, there seems to be little doubt but that it extends to all that the Receiver would have been required to pay (f). This point came before Lord Eldon, upon the question whether the sureties of a Receiver were liable to pay interest upon the balance in a Receiver's hands when he became bankrupt, and his Lordship said—"It seems to me that it would be difficult to say that where the principal debtor would be obliged to pay interest, there would not be an equity that the surety should pay interest in default of the principal. The penalty is forfeited by the breach of the condition; the amount of a penalty is the debt due from the sureties at Law. How can they have a right to be discharged, in this Court, from their legal liability till they have paid all that the principal could have been required to pay?" (g).

This rule, however, is capable of relaxation where the circumstances of the case will warrant it; accordingly, as the Receiver in the case referred to, had been bankrupt with the knowledge of all parties for a considerable time, and no steps had been taken to compel the passing his accounts, Lord Eldon refused to make the sureties pay interest (h). In what cases relaxed.

It seems that, where a Receiver has become bankrupt and the sureties are likely to be called upon to pay the balance due from him, liberty will be given to them to attend the passing of the Receiver's account (i). Surety allowed to attend passing of account.

When an action is brought against a Receiver's surety upon the recognizance, the proper course for him to pursue, appears to be, to apply to the Court, by motion, to stay the proceedings on the recognizance, offering at the same time to pay the amount due from the Receiver, so as the same does not exceed the amount of the recognizance, into Court; and, upon such motion, the order will be made upon the surety's paying the cost of the application, and of the proceedings consequent upon it. Course where action is brought against him.

When the Receiver's account has not been taken, the motion should also pray a reference to the Master to see what is due from

(d) *Hamilton v. Brewster*, 2 Mol. ante, p. 1995.

407. (g) Ibid.

(e) *Vaughan v. Vaughan*, 1 Dick. 90; *Blois v. Blois*, ib. 337. (h) *Dawson v. Raynes*, 2 Russ. ubi supra.

(f) *Dawson v. Raynes*, 2 Russ. 6; (i) Ibid. 467.

Extent of Liability.

Surety to stand in place of Receiver.

the Receiver ; and it seems that, upon such application, the Court will indulge the surety by allowing him to pay the balance in by instalments (*k*).

When a surety is called upon to pay any thing on account of the Receiver, he will be entitled to stand in the place of the Receiver for any thing which may be coming to him in the suit : therefore, where the Receiver of the Opera House had borrowed money from his surety to enable him to make the necessary payments to the tradesmen and others connected with the theatre, Lord Eldon decided that the surety was entitled to be repaid the amount lent, out of the balance in Court reported due to the Receiver (*l*).

#### SECTION IX.

##### *Managers and Consignees.*

Manager.

WHERE a Receiver is required for the purpose not only of receiving rents and profits, or of getting in outstanding property, for the purpose of carrying on or superintending a trade or business, he is usually denominated " a manager " or " a Receiver and manager."

In what cases appointed.

Of collieries.

The most usual cases in which managers are appointed, are those in which partnership trades are to be carried on, or which relate to mines or collieries. The grounds upon which the Court usually acts in making appointments in cases of this description have been already pointed out (*m*). It may, however, be useful in this place to refer more fully to the principle upon which the Court proceeds, which may be collected from Lord Eldon's judgment in *Jefferys v. Smith* (*n*), which has been already referred to (*o*). In that case his Lordship observed — " The question is, whether mines have not always been considered, not altogether, but in some sort, as a species of trade : how it may be in Wales, I don't know, but in my country, where there are frequently twenty owners of the same mine, if each is to have a set of miners going down the shafts to work his twentieth part, it would be impossible to continue working the mine ; must not a contract be implied that it was agreed to be carried on in a feasible way ? I believe I have a

(*k*) *Walker v. Wild*, 1 Mad. 528.

(*l*) *Glossup v. Harrison*, Coop. 61 ; 3 V. & B. 134.

(*m*) *Ante*, pp. 506-7.

(*n*) 1 J. & W. 298.

(*o*) *Ante*, pp. 506-7.

Manager.

note of a case, before Lord Hardwicke, which confirms me in the idea, that where there are part owners of a mine and they cannot by contract agree to appoint a manager, this Court will manage it for them." His Lordship subsequently said, "The case I alluded to was one before Lord Hardwicke, in 1737, and it probably did not occur to Lord Thurlow when he expressed his doubt as to the interference of this Court in the case of trespass. Lord Hardwicke, in that case, says that a colliery is to be considered in the nature of a trade, and where persons have different interests in it, it is to be regarded as a partnership, and that the difficulty of knowing what is to be paid for wages and the expenses of management gives the Court a jurisdiction as to the *mesne* profits which it would not assume with respect to other lands. On this ground, and on account of the peculiarity of this species of produce, the Court gives an injunction against trespass, and allows a party to maintain a suit for the profits which in other cases it would not do. Here there are twenty shares, and if each owner may employ a manager and a set of workmen you destroy the subject altogether, it renders it impossible to carry it on. It appears to me, therefore, upon several principles, without reference to the particular circumstances of the case, that where persons are concerned in such an interest in lands as a mining concern is, this Court will appoint a Receiver although they are tenants in common of it."

But a manager will not be appointed in mining concerns at the instance of a plaintiff not having the legal interest, who, after standing by and suffering the defendant to incur great expense and risk, comes forward upon the concern turning out profitable and claims an equitable interest. This was held, by Lord Rosslyn, in the case of *Senhouse v. Christian*, which was cited with approbation by Lord Eldon in *Norway v. Rowe* (p). In what cases refused.

In *Norway v. Rowe*, also, a Receiver was refused under similar circumstances:—There the plaintiff, an administrator, claimed a partnership in the equitable interest, fresh leases or rather licenses to work the mines having been obtained by the defendant, and the mines having been worked for some time under those leases accordingly. It is to be observed, also, that in *Rowe v. Wood* (q), it was held, that when a mortgagee of mines has become a partner, by purchasing shares in them, he is not to be regarded solely in his character of mortgagee; and though a Receiver would not be appointed against him as mortgagee, if he denied that his mortgage was satisfied, yet it would seem that the management must

(p) 19 Ves. 159.

(q) 2 J. & W. 553.

## Powers of.

be considered with reference to the benefit of the copartner as well as the rights of mortgagor and mortgagee, and it would be difficult to make out that the mortgagee could wholly exclude his partner from interference in the partnership. In that case it appeared, that there were subsequent agreements, the effect of which, Lord Eldon thought, gave the plaintiff a clear right to control the working of the mines, and his Lordship, although he declined to appoint a Receiver in the first instance, intimated that if the plaintiff should be impeded in the exercise of his rights, another application by him to the Court, after the other parties had been apprized of what the Court expected them to do, would be differently treated.

In the case of plantations in the West Indies.

Where the suit concerns plantations in the West Indies, the carrying on of which partakes of the nature of a trade, it is also usual to appoint managers. In the latter case, however, and in cases of a similar description where the estates are abroad, and the manager must necessarily be resident there, it is usual to add to the order directing the appointment of a manager, an order for the appointment of one or more consignee or consignees resident in this country, to whom the produce of the plantation in question may be remitted, and by whom it may be disposed of.

— usually accompanied by appointment of consignees.

The form of proceeding under an order for the appointment of a manager and consignee, is nearly the same as that under an order for the appointment of a Receiver.

Power of.

It is to be observed that a manager in the West Indies as well as a Receiver in the East Indies, has larger power as to letting and managing than a Receiver here. In a leading case on this subject, before Lord Thurlow, a motion was made that the manager of an estate in one of the West India colonies might give security faithfully to manage the estate, and to consign the produce to persons in England named in a former order; and his Lordship, in giving judgment, observed — “He must either employ the produce on the island or remit it here, as the nature of the service requires. To assign, or otherwise account for the produce, I take to be the proper form. As to giving security faithfully to manage, that is beyond the idea I have entertained of it. The security given by a Receiver here does not relate to the faithful management; but he gives security duly to account for the produce of the estate in his hands. He cannot set and let, or make expenditures upon the estate without an application to the Court. A manager there may in the discretion given to him make expenditures. Perhaps that may be a reason for it. If the order is, that

he shall account for the produce, the consignments will make part of the account. Remitting here is at the expense of 2 1-2 per cent. You would ruin the estate by insisting on his remitting such a part as could be applied there. Take an order that he shall account for the produce of the estate, of what he receives and what he applies there; and for consigning, so far as the management of the estate requires it, to the particular persons named in the former order" (r). Powers of.

It is to be observed, that, in *Forbes v. Hammond* (s), a manager was appointed of a West India estate, without giving any security whatever; but, in *Rutherford v. Wilkinson* (t), Lord Gifford, M. R., stated that that case was under special circumstances, and that in general, to warrant such a course, it should appear, by the report, that no manager could be found who would give security, or that the proposed person was fit to be appointed without security: under the circumstances of the case, however, his Lordship made the order for the appointment to be without security, with the consent of such of the parties as were capable of consenting. Securities.

It is to be remarked that the Court, in dealing with property in a colony, will provide against the inconvenience likely to arise from the death, absence or incapacity of the manager in existence, or appointed by the Court, by appointing another manager to act in such event (u); some doubt, however, appears to have been entertained, by the Master of the Rolls, as to whether a consignee in this country could be appointed, prospectively, to act in the event of the death of another, and although his Honor made the order in that case, he seems to have done so provisionally only, with the view to the question being discussed upon the report (x). Provision in case of death of Manager.

A manager of a West India estate is entitled to a commission on the produce sold or remitted, so long as he is resident in the island and personally acting; but if he is absent, he is not entitled to the commission himself, but he will be allowed all such sums as he has paid to others for the management of the estate during his absence, provided the payments are reasonable (y). Commission.

- (r) *Morris v. Elme*, 1 Ves. J. 139.  
 (s) 15 Jan. 1811, Reg. Lib. A 1810, fo. 178; *Seton* on Dec. 327.  
 (t) *Seton*, ubi supra, ex relatione Tinney.  
 (u) *Rutherford v. Wilkinson*, *Seton* on Dec. 327.  
 (x) It is stated, in *Seton* on Decrees, p. 327, that such orders have been since repeatedly made, but it is to be observed, that the instance referred to, of *Rutherford v. Wilkinson*, is one relating to the appointment of a manager.  
 (y) *Forrest v. Elwes*, 2 Mer. 68.



## CHAPTER XXXIX.

## PAYMENT OF MONEY, AND TRANSFER OF STOCK INTO COURT.

SECT. I.—*In what Cases directed.*

Meaning of  
the Term.

ONE of the most ordinary methods by which the Court enforces its jurisdiction of preserving property in dispute pending a litigation, is by ordering it to be brought in and deposited with the Accountant-general of the Court.

This officer is a new officer appointed pursuant to the stat. 12 Geo. I. c. 32, and stands in the place of the Masters and Usher, and does all such matters and things relating to the delivery of the suitors' money and effects into the Bank, and taking them out by order, and keeping accounts with the Bank, as were formerly done by the Masters and Usher (*a*).

When ordered

The payment of money or the transfer of stock into Court, is most usually ordered on interlocutory application in the case of personal representatives or other persons filling the characters of trustees having money in their hands, or stock under their control, which belong either wholly or in part to the plaintiff (1).

In the case of  
executors, &c.

It appears formerly to have been thought necessary for the plaintiff to show, in support of an application of this nature, that the executor or trustee had abused his trust, or that the fund was in danger from his insolvent circumstances, but the Court will now order so much of the trust estate as he admits to be in his hands to be paid into Court, whether he has abused his trust

(*a*) 1 Harr. (ed. Newl.) 23.

(1) Where a sum is reported to be due from a defendant guardian, and he acquiesces in the report, but the cause is delayed by other questions, the Court will sometimes order the reported sum to be paid into Court. *Clarkson v. Depeyster*, 1 Hopk. 274. See *Campbell v. Braxton*, 4 Hen. & Munt. 446.

To obtain an order upon a defendant to bring money into Court before the final hearing, it must appear, that he who asks it has an interest in the money, that he who holds it has no equitable right to it, and the facts so then shown must be open to no further controversy. *M'Kim v. Thompson*, 1 Bland, 156.

or not (1), and without requiring proof of any danger to the property pending the litigation (b) (2). In the case of Executors.

In *Blake v. Blake* (c) Lord Redesdale appears to limit the rule, as regards personal representatives, to cases in which there are no debts, or the debts are all paid and there is no purpose for which the money is to be left outstanding; but the rule appears to be much more extensive, and any balance which may be in the executor's hands will be ordered into Court, notwithstanding there are demands upon it to which the executor is liable. Thus, in *Yare v. Harrison* (d), an executor having admitted a large balance of the personal estate to be in his hands, was ordered to pay the whole into Court, although he stated that an action at Law was depending against him for a debt to a considerable amount due from the testator. The Court, however, gave the executor liberty to apply, in case the plaintiff in the action should recover against him; and it is to be observed that, upon a verdict being recovered at Law for upwards of 1700*l.*, the executor applied to the Court that it might be paid out to him, to satisfy the verdict, but that the Court ordered the money to be paid to the plaintiff in the action, and not to the executor; and upon a suggestion that the executor had incurred unnecessary costs and interest, by defending the action, the consideration of the question — whether the defendant should not answer personally to the estate for the amount of such interest and costs, was reserved to the hearing.

The same principle will apply to other persons than executors, In the case of trustees. who fill the character of trustees, whether they be such by virtue of an actual appointment or by implication. Upon this principle, the Court has ordered an auctioneer to pay into Court the balance of the deposit upon a sale, admitted by him to be in his hands after deducting his claims as auctioneer (e). Upon the same principle, where a testator having a debt secured on lands, bequeathed the

(b) *Strange v. Harris*, 3 Bro. C. C. 365, [Perkins's ed. note (a)]; and vide *Blake v. Blake*, 2 Scho. & Lef. 26; *Rutherford v. Dawson*, 9 B. & B. 17. (d) 2 Cox, 377, sed vide *Betagh v. Concannon*, 2 Moll. 559. (e) *Yates v. Farebrother*, 4 Mad. 239. (c) *Ubi supra*.

(1) *M' Kim v. Thompson*, 1 Bland, 156. Where it appears from the answer of a defendant guardian, that he has in his hands a specific sum, which he admits to be due to the plaintiff, and other matters in the suit are contested, the Court will order the admitted debt to be paid to the plaintiff without waiting for a final decree. *Clarkson v. Depeyster*, 1 Hopk. 274.

(2) See *Hall v. Hall*, 2 M'Cord Ch. 317; *Hosack v. Rogers*, 6 Paige, 415. Money may be brought into Court by trustee under a decree, if he doubts as to its proper application. *Wells v. Rolosen*, 1 Bland, 456. So to stop interest and costs in certain cases. *Chase v. Manhardt*, 1 Bland, 343.

By Trustees,  
&c.

debt to the mortgagor, with a desire that he would give a reversionary interest therein to a third person, and the mortgagor sold the estate, he was ordered to bring the mortgage money into Court, for the benefit of the devisee, subject to his own life-estate (*f*); and so where the defendant had covenanted to pay a sum of money to the trustees of his marriage settlement, but had omitted to do so, whereupon a bill was filed against him for the performance of the trusts of the settlement, to which he put in his answer admitting the settlement, and that the money in question was in his hands, he was ordered to pay it into Court. In making this order, the Court acted upon the principle, that where an answer contains a clear admission that there is trust money in the hands of the defendant, the Court will make an interlocutory order for securing it (*g*).

where they  
owe money to  
the estate.

So also where an executor admits a sum of money to be due from him, in his individual character, to his testator, the Court will order the amount to be paid into Court (*h*) (1); and this was done by Lord Eldon, notwithstanding a statement in the answer that the debts of the testator were not all paid, and that there were several outstanding to which the executor was liable (*i*).

It is to be observed that, in such cases, the Court proceeds upon the ground that, as the persons to pay and the persons to receive are the same, it assumes that what ought to have been done has been done, and orders the payment, not as a debt by a debtor, but as of monies realized and in the hands of the executor or trustee (2).

Although the  
money is in the  
hands of a  
partner.

Upon the same principle, money admitted by an executor to be in the hands of his partner, will be considered as in his own hands for the purpose of being called into Court (*k*); but in *Freeman v. Fairlie* (1), it was held that an admission by an executor that the whole amount of the property was invested in India, on public

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|-----------------------------------------------------------|------------------------------------------------------|
| ( <i>f</i> ) <i>Lewis v. King</i> , 2 Bro. C. C. 600.     | ( <i>i</i> ) <i>Mortlock v. Leathe</i> , 2 Mer. 491. |
| ( <i>g</i> ) <i>Rothwell v. Rothwell</i> , 2 S. & S. 218. | ( <i>k</i> ) <i>Johnson v. Aston</i> , 1 S. & S. 73. |
| ( <i>h</i> ) <i>Ibid.</i>                                 | (1) 3 Mer. 39.                                       |

(1) *Hall v. Hall*, M'Cord Ch. 317.

(2) See *Casey v. Goodinge*, 3 Bro. C. C. (Perkins's ed.) 110, 111, note (e) and cases cited; *Wankford v. Wankford*, 1 Salk. 299; *Winship v. Bass*, 12 Mass. 199; *Stevens v. Gaylord*, 11 Mass. 266; *Hays v. Jackson*, 6 Mass. 149; *Bigelow v. Bigelow*, 4 Ham. 138; *Lookier v. Smith*, 1 Keb. 313; *Kinney v. Ensign*, 18 Pick. 232, 236; *Hobart v. Stone*, 10 Pick. 220; *Ritchie v. Williams*, 11 Mass. 50; *Ips. Manuf. Co. v. Story*, 5 Metcalf, 310; *Bowen v. Fairman*, 6 Conn. 121; 2 Story Eq. Jur. § 1209; *Pusey v. Clemson*, 9 Serg. & R. 208; *Decker v. Miller*, 2 Paige, 149; *Stagg v. Beekman*, 2 Edw. 89; *Marvin v. Stew*, 2 Cowen, 781; *Schell v. Schroder*, 1 Bailey Eq. 394.

securities, either in his own name or in the name of a house in which he was a partner, but subject to his disposal, unless some part was in the hands of the house at interest, which he believed might be the case, was held not to be a sufficient admission of money in his hands to order the payment into Court of any part of it (m); for although an executor dealing with money in his hands, is bound to ear-mark it, yet if he does not do so, and cannot answer as to the state of it, the Court has no power to act as upon an admission (n).

By Trustees  
&c.

It is to be observed, that it is only upon the admission of the executor, or other trustee, that the trust money is actually in his hands, that the Court will order it to be paid in; if, therefore, a defendant admits a sum of money to have come to his hands properly belonging to the trust, but adds that he has made payments on account of the estate, he will be allowed to deduct the amount of his actual payments, and to pay in the balance only (o).

Balance in  
hand only or  
dered in.

This, however, will be the case only where the payments have been properly made; where the payments have been improperly made, *e. g.* where they involve a breach of trust, the trustee will not be permitted to avail himself of such payments for the purpose of resisting the payment into Court; therefore, where executors had by their answer admitted the receipt of the testator's property, but stated that they had lent it on a promissory note, the Vice-Chancellor, Sir John Leach, upon an application that they might pay the money thus lent into Court, held that, having admitted the receipt of the money, the executors could not by alleging an improper application of it, protect themselves from payment into Court (p). So also, where monies directed by a settlement to be laid out in government or real securities were lent by the trustees to the husband on bond, the trustees were ordered, on motion, to pay the money into Court (q).

Secus when  
payments have  
been improperly  
made.

This principle was likewise acted upon in *Rothwell v. Rothwell* (r), before referred to, in which the Court ordered the defendant to pay in a sum of money which he had contracted to pay to the trustees of his marriage settlement, but had omitted to pay.

And it is not only in cases where trust money has been improperly lent, that it will be ordered into Court, it will be ordered in, even where the lending may have been warranted, by the trust deed, upon the allegation that the fund is in danger (s).

(m) *Freeman v. Fairlie*, 3 Mer. 39. V. & B. 180.

(n) *Ibid.*

(o) *Anon.* 4 Sim. 359.

(p) *Vigrass v. Binfield*, 3 Mad. 62;  
vide etiam, *Beaumont v. Meredith*, 3

(q) *Collis v. Collis*, 2 Sim. 365.

(r) 2 S. & S. 217.

(s) *Payne v. Collier*, 1 Ves. J. 170.

By Trustees,  
&c.

Money must  
be trust mon-  
ey,

— and not a  
mere debt.

It is to be observed that in order to induce the Court to direct the immediate bringing in of a sum of money upon an interlocutory application, the money must be clearly trust money; where it is not impressed with a trust, but is in the nature of a mere debt, the Court will not make an order for the payment of it into Court till the hearing of the cause: thus, in *Peacham v. Daw* (t), where a bill was filed against a defendant, insisting that a certain sum of money claimed by her as a gift from the testator, shortly before his death, continued to be part of his assets, and upon the coming in of the answer the plaintiff moved that defendant might pay the money into Court, on the ground that she had admitted circumstances in her answer which made it clear that it was part of the testator's assets, Sir J. Leach, V. C., refused the application, observing that the proper course was to set the cause down upon bill and answer, and that it was "matter of decree."

In *Rothwell v. Rothwell* (u), the Court appears to have gone to a much greater length than in any case which preceded it, as the money ordered to be paid in was in fact a mere debt due from the defendant to the trustees, and had scarcely received the impress of the trust, never having been in the hands of the trustees; the Court, however, appears to have acted in this case upon the rule of equity—to follow trust money wherever it is to be found and to bring it into Court.

This rule has been laid down very broadly, by Lord Abinger, in *Lee v. Macauley* (x), who said "that where a Court of Equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it, that money must be brought into Court;" and it appears to have been the rule acted upon in *Payne v. Collier* (y), in which a trust fund, which had been lent by the trustees, was ordered into Court at the instance of the same trustees, upon the allegation by them that it was in danger.

Trust need  
not be abso-  
lutely  
declared.

It is not necessary, to induce the Court to order trust money to be paid in, that the trust should be one absolutely declared; it will, in many cases, do the same where the trust is only implied; as in the case of vendors and purchasers, in which case, as the Court considers what is agreed to be done as done, it will treat the vendor as a trustee for the purchasers of the estate contracted for, and the purchaser as a trustee, for the vendor, of the purchase money.

By Purchas-  
ers in pos-  
session.

Sir Edward Sugden, in his learned Treatise upon the Law of Vendors and Purchasers of Estates (z), thus states the rule in

(t) *Mad. & Geld.* 98.

(u) *2 S. & S.* 217.

(z) *1 Y. & C.* 267, *Exch. Rep.*

(y) *1 Ves. J.* 170.

(z) *Vol. 1, p. 357.*

practice of calling upon the purchasers of estates to pay their purchase money into Court; "A new practice has sprung up by which certainly some suits have been quickly disposed of, but which has been a great surprise upon many parties. I allude to the practice of ordering a purchaser *in possession of the estate*, upon motion, to pay the purchase money into Court. This, under special circumstances, has even been done before answer (*a*), but the purchaser has in some cases had the option to pay the money or give up possession (*b*); in others occupation rent has been set, deducting interest on the deposit (*c*), and in others a Receiver has been appointed (*d*); and payment of the money will be ordered, although by the agreement it is payable by instalments and a portion of it is to remain secured upon the estate (*e*)."

By Purchas-  
ers.

This rule has been adopted where the possession has been given under a mutual apprehension that the title could be immediately made good (*f*), where the purchaser had a sort of mixed possession with the vendor, and having paid part of the purchase money, was insolvent, and had attempted, without effect, to sell the estate (*g*)—where the purchaser approved of the title and prepared a conveyance, and then raised objections (*h*),—where the purchaser had been guilty of laches and cut underwood (*i*); even in a case where it appeared, on the face of the abstract, that the title was bad, but the purchaser had sold and conveyed the estate to another purchaser (*k*). So where, from circumstances, an acceptance of the title was inferred (*l*).—Again, where a time was fixed for the payment of the purchase money by instalments, and the property was a *coal mine* (*m*). In all these cases the rule has been applied, Where sale is and if the estate be sold under a *decree*, the purchaser, if he enters under a decree

(*a*) *Dixon v. Astley*, 1 Mer. 133; see *Burroughs v. Oakley*, ib. 52, 376, n.; *Blackburn v. Stace*, Mad. & Gel. 69.

(*b*) *Clarke v. Wilson*, 15 Ves. 317, [Samner's ed. Mr. Hovenden's note]; *Smyth v. Lloyd*, 1 Mad. 83; *Morgan v. Shaw*, 2 Mer. 138; *Wickham v. Evered*, 4 Mad. 53.

(*c*) *Smith v. Jackson*, 1 Mad. 618; *Smith v. Lloyd*, ubi supra.

(*d*) *Hall v. Jenkinson*, 2 V. & B. 136; see *Clarke v. Elliott*, 1 Mad. 686.

(*e*) *Younge v. Duncombe*, 1 You. 275.

(*f*) *Gibson v. Clarke*, 1 V. & B. 500; see 1 Mad. 607.

(*g*) *Hall v. Jenkinson*, ubi supra.

(*h*) *Walters v. Upton*, Coop. 92, n., but see *Bonner v. Johnston*, 1 Mer.

366; and see *Crutchley v. Jerningham*, 2 Mer. 502; *Fournier v. Edwards*, T. T. 1819, V. C. The deeds were executed and an application was made for the completion of the purchase but the purchaser had not the money. The motion was made upon the answer, by which the defendant claimed compensation for some charges.

(*i*) *Burroughs v. Oakley*, 1 Mer. 52, 376, n.; *Dixon v. Astley*, ib. 133, 378, n.; *Bradshaw v. Bradshaw*, 2 Mer. 492.

(*k*) *Brown v. Kelty*, L. I. Hall, July 1816, MS.

(*l*) *Boothby v. Walker*, 1 Mad. 197; and see *Smith v. Lloyd*, 1 Mad. 83.

(*m*) *Buck v. Lodge*, 18 Ves. 450.

By Purchas-  
ers.

Where it is  
not under  
deceit.

into possession, will be compelled to pay his purchase money into Court, unless he entered with the express consent of the Court (a).

But where the sale is not by the Court, and the seller has thought proper to put the purchaser into possession, with an understanding between them that he shall not pay his money until he has a title, the purchaser cannot be called upon to pay the money into Court in this summary way (o); nor can the payment be compelled where the vendor gives possession without stipulation (p), or the purchaser was in possession under another title before the contract (q); or the possession was given independently of the contract, and the seller has been guilty of laches (r); although, in such cases, the purchaser may make himself liable to the demand, by dealing improperly with the estate, *e. g.* cutting trees or selling it to another person (s). But the purchaser, after a long period, will not be permitted to keep possession of the estate and also withhold the purchase money: if a title has not been made, he will be put to his election within a reasonable time, *e. g.* two months, to give up the possession or pay the purchase money (t).

Not where  
agreement is  
by parol at so  
much per acre.

If an agreement be by parol, for sale, at so much per acre, and possession be given to the purchaser without any understanding respecting the period when the purchase money should be paid, and the bill alleges a quantity of land to be sold, which is denied by the answer, and the bill only seeks a performance as to the larger quantity, no money will be ordered into Court (u).

Sir E. Sug-  
den's Rules.

The same learned author then proceeds to deduce two simple rules from the cases: "1st. Where the possession is taken under the contract or is consistent with it, and the purchaser has not dealt improperly with the estate, the cause must take its regular course."

"But 2nd. If the possession by the purchaser without payment of the money is contrary to the intention of the parties, or is held according to it, but the purchaser has exercised improper acts of ownership, for example, cutting timber by which the property is lessened in value, or selling the estate by which the first seller's remedy is complicated without his assent; in such cases, the

(a) Anon. L. I. Hall, 16 July, 1816, MS.

(o) Gibson v. Clarke, 1 V. & B. 500.

(p) Clarke v. Elliott, 1 Mad. 606.

(q) Freebody v. Perry, Coop. 91;

Bonner v. Johnston, 1 Mer. 366.

(r) Fox v. Birch, 1 Mer. 105.

(s) Cutler v. Simons, 2 Mer. 103; Bramley v. Teal, 3 Mad. 219; Gell v. Watson, ib. 225.

(t) Tindal v. Cobham, 2 M. & K. 385.

(u) Benson v. Glastonbury, N. & C. Com. C. Coop. 42, this seems to be the point of the case.

Court will interpose and compel the purchaser to pay the purchase money into Court." By Purchasers.

The principle of ordering money into Court upon a trust by implication, was acted upon by the V. C. of England in *Parry v. Ashley* (x), in which his Honor directed the proceeds of a policy of four lives, upon a freehold house, which had been renewed by an executrix after the death of a testator, to be brought into Court, on the application of the widow in a suit instituted by her for the administration of the testator's estate; not on the ground that the proceeds of the policy formed part of the personal estate, but because they were affected with a trust for the benefit of the persons interested in the real estate under the will. Where there is merely an implied trust.

It was also followed, in *Lee v. Macauley* (y), where the Court of Exchequer held, that where goods had been specifically and not generally consigned by a trader abroad to merchants in this country, was trust money in the hands of the consignees, and upon a bill filed against them by the representative of the trader for an account, ordered the proceeds of the consignment to be brought into Court (z).

The practice of the Court with regard to compelling the payment into Court of money, constituting partnership property, has been stated by Mr. Collyer, in his treatise on the Law of Partnership (a), in the following manner. In cases of partnership.

As the rule is, that he who seeks equity must do equity, it seems clear that where the plaintiff is a private debtor to the partnership, he cannot insist upon an account without paying the amount of his debt into Court. Thus, in an early case, it is laid down that if one partner borrows any money out of the partnership trade, his own share shall be answerable for it, and he shall not be permitted to come into Equity and pray an account without making satisfaction for the debt (b). So in a case before Lord Nottingham, one partner having sued the other for money had and received, and the latter having filed his bill for an injunction to stay proceedings at Law and for an account, the Court entertained the suit, and decreed an account, the plaintiff having first paid into Court the money in question (c). Upon similar principles it should seem, that if the defendant swears by his answer that a specific sum is due from the plaintiff to the partnership as Where the plaintiff is a private debtor.

(x) 3 Sim. 97.

(y) *Ubi supra*.

(z) *Vide etiam Bogle v. Stewart*, Dom. Pro. 1801, cited *ib*.

(a) P. 165.

(b) *Vin. Abr. Partners*, (E), 5; *Meliorucchi v. Roy. Exch. Ass. Co.*

1 Eq. Ca. Abr. 8.

(c) *Gold v. Canham*, 2 Swanst. 325; 1 Ch. C. 311, S. C.



In the Case of  
Partnership.

Not when the  
defendant in-  
sists on a bal-  
ance due to  
him.

Secus where  
there has been  
*malu fides*.

a private debt, that sum must be paid into Court by the plaintiff before an account will be decreed.

But one partner, whether plaintiff or defendant, may receive *partnership* money and effects, and insist on not paying in the amount unless all the other partners will pay in what they have in their hands (*d*), and *a fortiori*, if a partner *as partner* receives money belonging to the firm, and admitting that he has received it, insists that there is a balance in his favor, there is no pretence for making him pay it in (*e*). If, however, a partner has received partnership money, under circumstances from which you can infer that he had agreed not to receive it, and that his receiving it was contrary to good faith, then he may be ordered to bring it into Court. Thus, in *Foster v. Donald* (*f*), where the plaintiff, and the defendant, David Donald, carried on business together in the north of England; it had been proposed to dissolve the partnership, and the terms of the dissolution had nearly been arranged, when the defendant said that before finally acceding to them it would be proper for him to go to London, for the purpose of consulting a friend residing there. In the course of his journey he went round to several customers of the firm in different parts of the country, and collected of them debts due to the partnership, to the amount of about 2318*l*. In one instance, a debt due by himself had been set off against a debt due to the firm, and he received the difference; upon a bill filed for an account of the partnership transactions, the defendant, though by his answer stating his belief that the balance of the account would be in his favor, was ordered to pay the 2318*l*. into Court.

It is to be observed, in that case the judgment was founded upon the conduct of the defendant, which amounted in fact to a fraudulent abstraction; but where there are no circumstances of that description to support the application, the rule will be adhered to, that "if a partner, as partner, receives money belonging to the firm, and admitting that he has received it insists that there is a balance in his favor, there is no pretence for making him pay it in (*g*)."

The subject has since been very fully discussed by Lord Cottenham in his judgment in *Richardson v. The Bank of England* (*h*), in which his Lordship has, with great clearness, pointed out the principles of the Court with regard to ordering the pay-

(*d*) *Foster v. Donald*, 1 Jac. & W. 253.

(*e*) *Ibid.* 252.

(*f*) *Ubi supra*.

(*g*) Per Lord Eldon, in *Foster v. Donald*, *ubi supra*.

(*h*) 4 M. & C. 165.

ment into Court of money by one partner at the instance of another partner, and the result is strongly confirmatory of the principles above laid down. In the Case of Partnership.

It is to be remarked, that although the Court will order trust money, admitted to be in the hands of a party, to be paid into the name of the Accountant-General, on interlocutory application, it will not order interest upon such money to be so paid (i). The only case in which the Court appears to have acted in opposition to this rule is that of *Freeman v. Fairlie* (k), but that was under peculiar circumstances, the defendant having, by his answer, admitted that he had made interest to a larger amount than the sum he was ordered to pay in, and Lord Eldon said, he was very unwilling to carry the practice further than it had been carried. Interest not in general ordered to be paid in.

The same principles which apply to trust monies, and will induce the Court to order them to be paid into the Bank, to the credit of the cause, will be acted upon in the case of trust stock, or trust money invested in Exchequer bills, which the Court will order the party holding to transfer into the name of the Accountant-General in trust, in the cause, or deposit in the Bank to the credit of the cause. The Court will also, wherever it may be necessary for their protection, order specific chattels to be deposited in the Bank with the privity of the Accountant-General. Rule applicable to stock, exchequer bills, and specific chattels.

A payment of money into Court upon an interlocutory application does not alter the rights of the parties interested in the fund; therefore, if an executor or administrator pays into Court money which he has received from the estate of the deceased, his right to retain a debt due to him from the deceased is not prejudiced (l), and where the fund in Court is insufficient to discharge the administrator's debt, his right of retainer will prevail against the plaintiff's right to have the costs of the suit satisfied (m) (1).

- (i) *Wood v. Downes*, 1 V. & B. 50. suit to which the husband and wife are parties, which will have the effect of depriving the wife of her right by survivorship, unless the payments be into the joint names of the husband and wife. Ante, p. 27.
- (k) Cited *ibid.* 3 Mer. 29.
- (l) *Langton v. Higgs*, 5 Sim. 229; — The only instance in which the payment into Court will affect the right of the parties, is where money due to a wife is paid into Court in a (m) *Chissum v. Dewes*, 5 Russ. 29, ante, p. 1570.

(1) Where the amount of the Master's report against a defendant is ordered, for security, to be brought into Court, and invested in stock, pending exceptions by the plaintiff, any gain or loss, which may ultimately accrue on the sale of the stock, is to be received or borne by the defendant. *Clarkson v. Depeyster*, 1 Hopk. 505. The payment into Court is a collateral security, and is not to be taken as a payment to the plaintiff. *Ib.*

Effect of.

It is said, in *Bencraft v. Rich* (*n*), that funds belonging to wards of the Court cannot be transferred into the name of the Accountant-General to the credit of the cause, until the account has been taken by the Master, and his report made; — this, however, must be understood as meaning merely, not that such a transfer cannot be made, but that it will not operate as a discharge to the trustees until they have passed their accounts (*o*).

## SECTION II.

*Application for.*

WHEN it is said, that where a Court of Equity traces out trust money in the hands of a person who has not *prima facie* a right to hold it, that money must be brought into Court (*p*), the *dictum* must be understood as implying that the person applying to have it brought in must have an interest in its protection.

General rule.  
By whom to  
be made.

The general rule may be stated thus, that the plaintiffs must be solely entitled to the fund, or have acquired in the whole fund such an interest, together with others, as entitles them on their own behalf and the behalf of those others to have the funds secured in Court (*q*).

Where plaintiff is only entitled to an ascertained portion.

It seems, however, that where the plaintiff is merely entitled to a portion of a fund, which portion is clear, he will only be permitted to have the portion, to which he is entitled, secured; therefore, where a widow, as administratrix of her husband, was called upon to transfer into Court a sum of Bank Stock which formed part of the personal estate of her husband, whose debts had all been paid, the Court of Exchequer thought that, as she was clearly entitled to a third of the personalty, they could not keep her out of the possession of that part, and accordingly granted the rule only as to two-thirds of the Bank Annuities (*r*).

Party applying must show a title to the property.

It is to be noticed, that the party applying must show an actual title to the property intended to be secured, or some part of it, either in possession or reversion, and that a probability of title will not be sufficient; therefore, although the Court will appoint a Receiver of personal estate, on account of the pendency of a suit in the Ecclesiastical Court to recal the probate of a will, it will not,

(*n*) 1 Bro. C. C. 56.

(*o*) Vide *ibid.* Belt's edition, note (1).

(*p*) Ante, p. 2014.

(*q*) *Freeman v. Farley*, 3 Mer. 39.

(*r*) *Rogers v. Rogers*, 1 Anst. 175.

account alone, order the executor named in such will to pay the money into Court, money in his hands belonging to the deceased's estate. By whom to be made.

Applications for payment of money, &c. into Court, should be made by special motion, of which notice must be given, and they are commonly made after the answer has come in; but they are unfrequently made after decree upon admissions in proceedings before a Master, and may in some cases be made before a Master. In what manner made.  
When made.

Upon an application for the payment of money into Court after answer, there must be a clear admission, by the answer, of the plaintiff's title; therefore, where the defendant by his answer merely says he does not know and cannot set forth as to his title, otherwise, whether the plaintiff sustains the character he alleges, an order will not be made (t).

Will the plaintiff be allowed, in such a case, to make use of affidavits to supply the defect in the answer, the rule of the Court is that the order shall be made upon the defendant's admission (u) (1). This rule, however, must be understood as applying to proof of the plaintiff's title; for it has frequently been held that though the Court will not, upon application of this kind, receive affidavits to be read in support of the plaintiff's title, it will receive affidavits to verify collateral facts; thus, upon a motion for an order that a purchaser may pay his purchase-money into Court, it is usual to receive affidavits to be read to prove that he has exercised acts of ownership (x).

The Court will not order money into Court where there is no admission of the plaintiff's right, still less will it do so where it is denied by the answer; therefore, if a bill be filed stating a settled account and by the answer it is denied that the account is just, the plaintiff cannot move that the defendant may pay into Court the amount of the account. Never ordered where title denied.

*Edwards v. Harris*, 7 Sim. 639. Court setting aside the will as to the real estate, on the ground of the insanity of the testator.

(t) *Dubless v. Flint*, 4 M. & C. 502; see also *Farrer v. Hutchinson*, 3 Y. & C. 706, Exch. Rep.

(u) *Black v. Creighton*, 2 Moll. 554.

(x) *Bradshaw v. Bradshaw*, 2 Mer. 492; *Crutchley v. Jerningham*, ib. 502; ante, p. 1269.

*Johnson v. Depeyster*, 1 Hopk. 274, cited ante, 2010, in note.

After Answer: money on the account so admitted, as he might if the account were admitted to be correct (y).

Actual amount  
may be shown  
by affidavit.

It must also appear to be admitted, either in the answer or in the schedules annexed to it, that there is a balance actually in the hands of the defendant (x). It is not, however, necessary, that the actual amount of the balance should be stated either in the answer or in the schedules; if the answer contains a schedule cast up, the sums may be cast up, and, on affidavit of the amount of what appears to be due, the order will be made (a).

It is to be observed, however, that in such cases it is the answer only that is to be relied upon, and thus no affidavit can be used in support of the application, except that of a calculator or accountant who examines the schedule annexed to the answer, and swears to the amount in the hands of the executor appearing therefrom (b).

Where a book  
is referred to  
by answer.

It is true, that if a defendant brings a book into the Master's Office, and states that it contains an account of receipts and payments, and affidavit is made giving the defendant the credit he craves, charging him with what he admits, and simply casting it up, the balance may be ordered in upon motion (c); but if the case is more complicated than that, and the question is what is the result of that more complicated account, that cannot be the foundation of a motion for paying in the money (d).

And it is to be observed, that as the motion must be founded on an admission in the answer, it is necessary, where the application is made to order payment upon an account appearing in a book, the book must be referred to in such a way as to make it part of the answer or schedule (e), and where the defendant has referred to several books, it will not be sufficient to make the application upon the casting up of some of the books, it must be the result of *all the books* (f).

Defendant allowed to discharge himself by affidavit.

The same indulgence which is allowed to a plaintiff of verifying the amount of the balance admitted by the answer, will, in certain cases, be extended to the defendant; and where an executor admits, in his answer, that he has received a specific sum be-

(y) — *v. Bailey*, 30 July, 1805; 2 Mad. C. P. Ed. 1837, 523; vide etiam, *Richardson v. The Bank of England*, 4 M. & C. 177.

(z) With respect to what will be considered as money in the hands of a defendant, vide ante, p. 2012.

(a) *Mills v. Hanson*, 8 Ves. 68; *Quarrell v. Beckford*, 14 Ves. 178.

(b) *Black v. Creighton*, ubi supra; vide etiam *Richardson v. The Bank*

of England, 4 M. & C. 166, 177, in which the principles upon which money is ordered into Court upon a defendant's admission is very fully reviewed.

(c) *Mills v. Hanson*, ubi supra.

(d) Ibid.

(e) Ibid, *Roe v. Gudgean*, Coop. 304.

(f) *Mills v. Hanson*, ubi supra.

longing to the testator's estate, but adds that he has made payments on account of the estate, the amount of which he does not specify, the Court will allow him to verify the amount of his payments by affidavit, and then will order him to pay the balance into Court (g). After Decree.

It may be noticed in this place, that where an application was made to Sir A. Hart, L. C., in Ireland, to discharge an attachment issued for disobedience of an order, made by the Master of the Rolls there, for the payment into Court of a balance admitted to be in his hands, the question arose whether the executor was entitled to retain enough to answer the probable accruing expenses of suits; and that his Lordship upon that occasion observed, that Sir J. Leach had always held the opinion that the executor should bring in all; but that when he (Sir A. Hart) was Vice-Chancellor, he had acted on a different principle; and that he thought the Court had no right to cramp any executor who was engaged in suits, by leaving him to carry on those suits on his own funds, and that Lord Eldon had sustained his views in that respect, — "I do not mean," his Lordship continues, "merely costs already incurred; there never could be any doubt about them, but probable growing costs. I know it is said the executor can come to the Court for money to be advanced to him as he wants it, but I do not think he is to be compelled to do that (h)." It is right, however, to state that the opinion of Sir Anthony Hart, in the case referred to, appears to be at variance with that of Lord Thurlow in *Yare v. Harrison* (i).

Money may be ordered to be transferred into Court after decree, either upon admissions in the examination of an accounting party or upon the Master's report. Upon admission in the examination.

It is stated by Lord Eldon, in *Hutch v. —* (k), that according to the old practice, you could not, between the original decree and the hearing upon further directions, move to have money into Court; but that applications upon examinations admitting money to be due have been long the settled practice. The rules which govern applications of this nature, at this stage of the cause, are precisely the same as those which govern applications upon admissions in the answer, with the exception, however, that the party applying need not be the plaintiff in the cause; indeed if the plaintiff be the accounting party, the application may be made

(g) *Anon.* 4 Sim. 369.

(h) *Betagh v. Concannon*, Moll. Downes, 1 V. & B. 49; *Fox v. Mackreth*, 1 Ves. J. 69.

(i) 2 Cox, 377; ante, p. 2011.

(k) 19 Ves. 116; et vide *Wood v.*

**Upon Answer.** against him. It also will be unnecessary to show the title of the party to make the application by admission, in the examination but such title must appear from the decree or other proceeding in the cause.

**Upon Master's report.** It appears to have been formerly the practice, not to order money into Court upon the Master's report before the hearing upon further directions; but, in *Gordon v. Rothley* (l), this practice appears to have been first broken through, and that decision has since been recognised by Sir John Leach, V. C., in *Creak v. Capell* (m). It seems, however, that, to entitle a party to obtain such an order, the report must have been confirmed, and that, pending exceptions to the report, the balance will not be considered to be ascertained (n) (1).

**Notwithstanding exceptions.** Where, however, it is evident, that an exception is taken merely for delay, the Court will advance the exception for immediate hearing (o).

**Upon hearing exceptions to report.** It is to be observed that, upon hearing exceptions to the Master's report, it is competent for the Court, although it allows them and directs the Master to review his report, to order the accounting party to pay a sum of money into Court, without a special application by motion. The Court, however, will not do so unless it is satisfied that the probable result of the reference back to the Master will be the finding such a sum due from the party (p).

**Before answer.** The cases in which the Court have ordered money into Court before answer, are very rare. In *Jervis v. White* (q), Lord Eldon made such an order upon the ground of fraud, and in doing so stated, that he fastened upon the affidavit of the defendant in answer to that filed by the plaintiff, as Lord Kenyon had done in *Vann v. Barnett* (r), where though it was held that in general in such cases the Court will not act effectively between the parties till the answer comes in, yet if the defendant answers the affidavit, the Court will look at the affidavit as if it were the answer.

Where defendant answers by affidavit.

(l) 3 Ves. 572.

(m) *Mad. & Geld.* 114.

(n) *Ibid.*

(o) *Mad. & Geld.* 114.

(p) *Brown v. De Tastet*, 4 Russ.

(q) 6 Ves. 738, [739, Mr. Hovenden's notes.]

(r) 2 Bro. C. C. 158, [Parkinson's note (a)].

(1) See *Clarkson v. Depeyster*, 1 Hopk. 274, cited ante, 2010, in note. A report of the commissioner is necessary before the Court will order the executor to pay into Court a debt he may owe the testator; there being a settlement of accounts to be made. *Hall v. Hall*, 2 M'Cord, Ch. 317.

The Court has also, as has been already stated, ordered the purchaser of an estate to pay his purchase-money into Court before the answer has been put in (s). Manner of paying money, &c. into Court.

It is to be recollected, that, in *Higgins v. ———* (t), Lord Eldon directed, as a general rule, that in future, upon motions for the payment of money or transfer of stock into Court, a day should be named, and said that where an order is obtained to pay money into Court, at a given time, the Court will inquire whether there has been any former order, and, if there has, will make the party show cause why he shall not pay interest. In the case of purchaser. Day must be named in the order.

Before leaving this branch of the subject, it is desirable to state the manner in which orders for the payment of money, the transfer of stock, or the delivery of specific articles into Court, are practically carried into effect. The Governor and Company of the Bank of England have the general custody of the effects of the suitors, as the bankers of the Court of Chancery. This property consists of cash, stocks, Exchequer bills, India bonds, shares in public companies, and specific articles deposited. Of these effects stock stands in the name of the Accountant-general in the books of the Bank, in trust in the particular cause to which it belongs. Other effects are placed in the Bank to the credit of the cause or matter in which they are directed to be paid in or deposited. The Accountant-general does not himself receive any of the money or effects of the suitors of the Court; but they are placed in the Bank of England, with which he keeps an account, according to the several causes and matters to which such money and effects severally belong. Manner of paying money, &c. into Court.

No money or effects of any kind can ever be paid into the Bank in the name of the Accountant-general in any cause, unless an order for that purpose has been obtained from the Court upon the application either of the person desirous of paying the money in, or of some party desirous of enforcing the payment. No money, &c. paid into the Bank without an order.

When, however, money is paid in under the authority of an Act of Parliament, containing express directions for that purpose, a previous order of the Court is, as we shall hereafter see, unnecessary (a).

When an order for the payment of money into Court has been obtained, the party desirous of complying therewith must, after the Order to be left at the Accountant general's office.

(s) Vide ante, p. 2015.

(t) 8 Ves. 381; ante, p. 1250.

(a) See post, ch. XLIII. sts. 36 Geo. III. c. 62; 1 & 2 Vic. c. 117.



**Mode of Payment.****Manner of transferring stock into Court.****Mode of depositing Exchequer bills, India bonds, and specific articles.**

order has been duly passed and entered, leave either the original order or a Registrar's office copy thereof with the clerk of the Accountant-general in whose division the cause is (b).

For each sum of money to be received by the Bank, the Accountant-general signs a direction mentioning the order, report, or Act of Parliament, under the authority of which the person named in these is to pay the sum therein specified, and ordering it to be placed to his account as Accountant-general, to the credit of the particular cause or account mentioned. When the party paying in the money, or his solicitor, brings in to the Accountant-general's office a receipt from the Bank of such payment having been made, the Accountant-general signs a certificate of such payment, and annexes it to the Bank receipt for the purpose of being entered in the Report Office.

For each amount of stock directed by any order of the Court to be transferred into the name of the Accountant-general, application is made to the first Clerk in the office for a ticket or notification specifying the amount of the stock to be transferred, and the cause or account to which it is to be placed when such transfer is made; the Accountant-general accepts the stock, and signs a certificate to the Bank of his having made such acceptance. Of this transfer of stock there is a certificate sent from the Bank, or such other office where the stock may be, to the Accountant-general's Office, and the Accountant-general signs another certificate of such transfer, and of his acceptance of the stock, and annexes it to the certificate from the Bank or such other office where the stock may be, for the purpose of being entered and filed in the Report Office, from whence the party may procure an office copy of these certificates.

For each parcel of Exchequer Bills or India Bonds, and for each package containing specific articles, directed by any order of the Court to be deposited in the Bank, in the name of the Accountant-general, he signs a direction for the person named in such order to make such deposit in the Bank, in his name, and to what cause or account it is to be placed. When the party or his solicitor brings into the Accountant-general's Office a certificate from the Bank that such deposit has been made, the Accountant-general signs another certificate that such deposit has been made in the Bank, and annexes it to the Bank certificate for the purpose of being entered and filed in the Report Office.

(b) The Accountant-general will less under very special circumstances not act upon the minutes of the order, ces.  
or upon a Report Office thereof, un-

When cash has been paid into Court, it cannot be invested by the Accountant-general without an order authorizing it. Usually, when the order for payment is obtained, application is made by the plaintiff, or party interested in the money, that a direction be inserted in the order for the investment of the money when paid in (c). If the sum be large (d), or if it be likely to remain in Court for some time without any person being entitled to the dividends or interest accruing due, upon it, application should be made that the interest and dividends upon it should be invested also (e). In cases where money is paid into the Bank without an order of the Court, or where, upon the order being obtained, no direction for investment or accumulation is added, a separate application for either of these purposes may be made. The rule of the Court is, that all money in Court shall be laid out in Bank 3 per cent. annuities; possibly, however, the recent stat. 7 & 8 Vic. c. 5, by which the 3*l.* 10*s.* per cent. stock was converted into 3*l.* 5*s.* per cent. annuities, may make an alteration in this respect, inasmuch as this stock is in some respects now the more permanent of the two. Where money is paid in under an Act, the statute itself frequently prescribes the securities in which it may be invested. The dividends and interest of the several Stocks, India Bonds, and other securities, are received by the Bank as they become due, under a power of attorney from the Accountant-general, and placed to the credit of the causes and accounts to which they respectively belong; the Bank sends quarterly to the Accountant-general's Office a book called the dividend book, signed by an officer of the Bank, which book, containing the amount of the securities and interest moneys belonging to each cause and account, is countersigned by the Accountant-general, and entered and filed at the Report Office.

The 26th Order of 1833, prescribes the form in which the orders are to be drawn up by the Registrars, upon which the Accountant-general acts. The effect of it is, that in all orders for payment or delivery in or out of the Bank, or for investment or transfer of moneys or effects, the exact sum shall be ascertained by the Registrar, and specified in the order in words written at length:—“Except in the case of residues of money or securities remaining after a portion directed to be applied for particular pur-

(c) Ante, p. 1458.

(d) If the sum is very large, the order ought to direct that the money be laid out in portions, as was done in the case of the London and York railway, where the sum was 250,000*l.*

and it was directed to be laid out in the purchase of Exchequer bills in parcels of 50,000*l.* each, 11 Rig. Lib. 1844, B. f. 389.

(e) Seton, p. 33.

Orders for Payment, &c.

Investment of cash.

In what funds invested.

Form of orders to be drawn up by the Registrars.

How enforced.

poses, the amount of which cannot be ascertained at the time of making the said order, in which cases the order shall direct that the amount of such residues, and shares of residues, shall be ascertained and specified by affidavit."

The Order also provides that both the persons to pay in, and also the persons to receive, under an order, shall be described by name, and their names and titles written at length, except in the case of bodies corporate, companies or societies, and not merely as plaintiffs, or petitioners, or the like.

It also directs that in all orders directing the payment of dividends and annuities, the time when the first of such payments shall be made, and when all subsequent periodical payments, whether quarterly, half yearly, yearly, or otherwise, shall be specified and expressed in words at length. That all orders directing the laying out of sums of money of uncertain amount in the purchase of securities, do direct that such investments shall be made when the money shall amount to a competent sum, and not sooner.

Form of Master's report apportioning monies or securities.

The remainder of the Order relates to different cases where it is referred to a Master to apportion moneys or securities, and provides that the amount shall be ascertained and stated in the report in words at length:—"Except in the case of residue of money or securities remaining after a portion directed to be applied to certain purposes, and the amount of which portions cannot be ascertained at the time of making such report, in which case the amount of such residue and portions shall be ascertained by affidavit." It also directs in such cases that the names of the persons to pay and receive shall be written at full length.

Manner of enforcing orders for payment of money into Court.

The order for the payment of money, transfer of stock, or delivery of effects into Court, ought to state a time within which it is to be complied with (*f*). If such a direction be omitted, the decree is not thereby rendered ineffectual, but the Court will, upon motion for that purpose, fix a time for the performance of the act (*g*). The order having been duly passed and entered, a copy thereof endorsed according to the 12th Order of August, 1841 (*h*), must be personally served upon the party to make the payment before the expiration of the period limited by the order for that purpose. If such service cannot be effected within this time, a motion must be made that the party may pay in the money within a further period stated by the notice of motion. At the expiration

(*f*) 11th & 12th Orders, August, 1841.

(*g*) *Needham v. Needham*, 1 Har., 633.

(*h*) See ante, p. 1250.

of the period limited by the order, upon an affidavit of personal service, and a certificate of the Accountant-general that the money has not been paid in, an attachment may be issued against the party making default (i). If the party to pay in the money be a peer, or person entitled to the privilege of Parliament, the practice seems to be that upon his making default after due personal service upon him of a copy of the order, a motion is made for a sequestration nisi, and in the event of the money not being then paid, an order absolute may be obtained (k).

How enforced

As against a peer or privileged person.

Lastly, it may be observed, that the office of the Accountant-general was created by Stat. 12 Geo. I. c. 32, and that the provisions of that Act still regulate, in many respects, the practice in his office.

(i) Ante, p. 561.

(k) *Crawley v. Clarke*, 3 Bro. C. C. 373.

## CHAPTER XL.

## THE PAYMENT OF MONEY OR TRANSFER OF STOCK OUT OF COURT.

By decree. WHEN, in the progress of a cause, money has been paid, stock transferred, or specific articles deposited in Court, the decree at the original hearing or upon further directions frequently provides for the payment, transfer, or delivery of the same to the parties then entitled thereto. It however often happens that the rights of the parties to the effects in Court at the time when the decree is made, are not such as to enable the Court then to make an order for absolute payment, or delivery to them. Under such circumstances, where the report of the Master finds that a certain proportion of the fund in Court, or a precise sum, belongs to any particular party, or set of defendants, then if there is any incumbrance affecting such share, or if the interest in it is delayed until the happening of some event, as for instance, till a party attain the age of twenty-one, or till the death of a previous tenant for life, the Court will, on the hearing, order the share to be carried over in trust in the cause to a separate account. The effect of which is, that on the person entitled to this share subsequently applying for payment, it will not be requisite to serve any of the parties to the cause with notice of the application (1).

Carrying over a fund to a separate account. In such a case the decree contains a direction that the parties shall have liberty to apply, so that when the interest in the share has become absolute, the person entitled thereto may apply for payment by petition. Formerly, when the money had been carried to a separate account, and the title to it was clear, an order for payment might have been obtained by motion (a) (2), but Lord Langdale, M. R., has refused to adopt this practice (b) (3).

Liberty to apply.

Must be by petition.

(a) *Heathcote v. Edwards*, 3 Jac. 504.

(b) *Garratt v. Niblock*, 5 Beav. 103.

(1) See *ex parte Van Vorst*, 1 Green, Ch. 292.

(2) Where money is placed in the hands of the receiver pending the litigation, the Court may, on the decision of the cause, direct its application on motion. *Bank of Mobile v. Planters' & Merchants' Bank*, 1 Ala. 109.

(3) See *ex parte Van Vorst*, 1 Green Ch. 292.

Upon the hearing of a petition of this kind, the title of the petitioner, to the immediate payment of the fund, is made clear by reports of the Master in the cause or by the previous orders of the Court, the petition must be supported by evidence of all facts necessary to establish the title. The evidence in such a case is given by affidavit; in other respects the same mode of proof is necessary as that required to prove similar facts upon other cases. Application should also be made, previously to presenting the petition, to the Accountant-general for a certificate of the amount of the fund sought to be affected, as well for the purpose of stating correctly the items in the petition, and the accounts in which they stand, as also for the sake of ascertaining whether the fund is affected by any stop order. Moreover it is absolutely necessary that this certificate should be left with the Registrar when the petition is made upon the petition is bespoken (1).

In a general rule, upon the presentation of a petition of this kind, the Court will not make an order for payment to any person other than the person or persons entitled to the money. Where, however, the fund is small in amount, or has to be divided amongst so many persons that the share of each would be small (b), and consequently the expense of separate orders and powers of attorney would be tantamount to the whole, the Court has ordered payment to the solicitor upon his undertaking to distribute the fund among the petitioners. In the case of *Kelsall v. Minton* (c), Lord Langdale, M. R., held that the rule which he had adopted, and which must be followed on that occasion, was not to make any such order unless the petition praying for payment to the solicitor was signed by the party, unless a written authority was produced, signed by the party, stating that they were desirous that their money should be paid to the solicitor" (2).

Proceeding upon Petition.

Supported by affidavit.

Certificate of Accountant-general.

To whom payment ordered.

To the solicitor in what cases.

not exceeding 10l.; see *Brund. v. Humble*, Jac. 48. (c) 2 Beav. 361.

In all cases of special applications for orders to pay out money brought out of court, the party applying must produce the certificate of the registrar in which the money was deposited, showing the amount of the fund and the way in which it is invested, and the claims, if any, which have been made thereon, so that an order may be entered to enable the applicant to receive the fund. *Hulbert v. McKay*, 8 Paige, 652. Where the fund was clear, and the rights of the respective parties ascertained, the Court directed, pending the account, a part of the money to be paid to the solicitor of infant plaintiffs, towards further defraying the past and future expenses of the suit, and the interest on the residue of the portion of such infants, to be paid as it accrued to their mother, for their ordinary maintenance and education. *Meth. Epis. Church v. Jaques*, 3 Ch. 1.

To what Person Payment is made.

To person authorized by power of attorney.

Form of petition in such a case.

Whether payment will be ordered to a person under a general authority.

Accountant-general acts under power of attorney.

Payment to a personal representative.

It is only when the amount of the fund is small that the general rule is relaxed by allowing the solicitor to receive the fund without a power of attorney; but where a regular power of attorney, authorizing a particular person specifically to receive the fund in question has been duly executed, it seems that, however large the amount, the Court will upon proof of the due execution of the power, and that the same is still in force, order payment to the person so authorized (*d*) (1). In such a case perhaps, strictly, the petition ought to be by the attorney as well as by the party. In a very recent case of *The Marquis of Hertford v. The Earl of Langdale* (*e*), Lord Langdale, M. R., ordered payment to a solicitor fully authorized by a power of attorney from the legatee where the amount was little short of 100,000*l*. In this case the petition was supported by an affidavit of the due execution of the power, and that it was still in force. The power itself was so worded as that it did not become inoperative immediately upon the death of the party. The order did not affect any funds in Court in the case; but directed the executors to pay the sum in question out of the assets in their hands, they neither opposing nor consenting to the application.

There is a case of *Carr v. Estabrooke* (*f*), where a legacy of 100*l* was ordered to be paid to a person having a general power of attorney from the legatee, without any power authorizing him to receive this legacy specifically. In this case, however, the circumstances disclosed by the affidavits were special, and it seems doubtful whether the authority would be followed except under like circumstances. When an order for payment has been made to the party himself, it is the ordinary practice for the Accountant-general to make the payment to persons authorized by power of attorney (*g*).

If the order is made for the payment to the party himself, or his personal representative, then, in the event of the death of the party before payment has been made, the Accountant-general will receive

- (*d*) *Hill v. Chapman*, 11 Ves. 239. powers must be executed and verified, see *Hutcheon v. Mannington*, 6 Ves. 823; Lord *Kinnaird v. Lady Saltoun*, 1 Madd. 227; *Garvey v. Hibbert*, 1 J. & W. 180.  
 (*e*) 14th January, 1846, ex relatione Mr. Tripp.  
 (*f*) 2 Cox, 390.  
 (*g*) For the mode in which such

(1) Money may, upon the production of the proper vouchers, be paid out of Court to the attorney in fact of the party. *Hoge v. Penn*, 1 Bland, 40.

But it will not be paid out to a guardian *ad litem* of an infant party. *Corrie v. Clarke*, 1 Bland, 85. After a sale to effect a division, however, the share awarded to the infant may be paid to the mother, on her giving bond to account as guardian. *Spurrier v. Spurrier*, 1 Bland, 477.

the probate of the will as proof of the death, and will pay the personal representative (h).

When the Cause has abated.

In the case of *Moody v. Bainbridge* (i), such an order was made for payment to a party, or his personal representatives, of a legacy; died, leaving an executrix, and two executors; the executrix died, thereupon the Accountant-general refused to pay the legacy of three.

Payment to two executors surviving out of three.

Under a power of attorney from the surviving co-executors without discharge from the executor of the deceased executrix. On an application to the Court, an order was made to pay the legacy to the surviving executors. If, however, the order is made for payment to a party without introducing the words "or his personal representatives," or words of similar effect, the Accountant-general will not act upon the order after the death of the party, but an application to the Court will be necessary.

When order for payment is not to the party, or his personal representatives.

It is stated, that however small the amount of the fund to be paid out of Court a prerogative probate is always necessary (k); in practice, however, is, where the sum does not exceed 30*l.* for the Accountant-general to pay to a personal representative under a provincial probate.

When prerogative probate necessary.

A considerable interval of time frequently occurs after the hearing of a cause before any person acquires such an interest in the cause as to be entitled to obtain an order for payment. In many cases, therefore, when the period arrives, the cause will have come abated, and it is therefore of some consequence to consider in what cases the Court will make an order for the payment of money out of Court, notwithstanding the suit has abated. It is stated in an old case, that "it was every day's practice to order money out of Court to the party entitled by the decree, notwithstanding the death of some of the parties" (l).

Orders for payment of money pending an abatement of the suit.

In the case of *Roundell v. Curren* (m), the fund had been carried to the separate account of the plaintiff, and after his death a petition was presented by his personal representative for payment of the fund. The right to it was clear, but there was a doubt whether an order could be made in a cause after an entire abatement by the death of the plaintiff; Lord Eldon, after consideration, made the order (n).

When abatement caused by the death of the plaintiff

In a case of *Legard v. Hodges* (o), a petition was presented in a very old cause, and from the title of the petition it appeared that all the parties to the cause were dead.

When all the parties to the cause dead.

(h) *Clayton v. Gresham*, 10 Ves.

(m) 6 Ves. 250.

(i) 6 Mad. 107.

(n) See also *Lord Shipbrooke v. Lord Hinchinbrook*, 13 Ves. 387.

(k) *Thomas v. Davies*, 12 Ves. 417.

(o) V. C. of England, 26 July,

(l) *Finch v. Lord Winchelsea*, 1844, ex relatione Mr. Tripp.

1844, ex relatione Mr. Tripp.

ch. 1737; Eq. Ca. Abr. 2.



When the Cause has abated.

ed that all the plaintiffs and defendants were then dead (p). By the decree, liberty to apply had been reserved upon the death of a certain tenant for life; and it was the death of this tenant for life which gave to the petitioner his right to the fund. Notwithstanding the complete abatement of the cause, the V. C. of England, in the first instance, directed a reference to the Master, and upon his report made an order for the payment of the fund out of Court.

Order for payment after dismissal of bill.

In the case of *Wright v. Mitchell* (q), a bill had been filed to set aside the assignment of a lease, and the tenants being male parties had paid the rent into Court. The bill was dismissed for want of prosecution, and afterwards upon motion by the assignees of the lease for payment of the money to them, Lord Eldon held that the Court had a jurisdiction to make an order for payment of the money out of Court notwithstanding the bill had been dismissed.

Money paid over to a separate account where party entitled is a married woman.

Another instance in which the Court orders money to be paid over to a separate account occurs when the party entitled to it is a married woman. In such a case the practice is, notwithstanding her interest in the fund is immediate, for the Court not on decree to order payment at once, but to direct that the fund be carried to the account of her and her husband (r). After the fund has been thus transferred, a petition may be presented by the husband and wife, or such a petition may come on together with the cause on further directions. In one case Sir J. L. Knight Bruce, V. C., is reported to have ordered payment to a married woman upon petition without the fund having been carried over to her separate account, where it consisted of an unascertained residue after payment of costs (q). The practice upon the hearing of such a petition, and the evidence that must be adduced in support of it, have been stated in a former part of this work (r).

Manner of transferring stock or funds from one account to another.

When any sum or stock is directed by any order to be carried over from one cause to another, the Accountant-general signs a certificate to the Bank, directing such sum of cash or stock, in a particular cause or account, to be carried over to some other cause or account, mentioning the order under the authority of which such carrying over is directed; the Bank then sends a certificate to the Accountant-general's office of such carrying over having been made; the Accountant-general then signs another

(p) Reported on the hearing, 4 Bro. C. C. 421.

(q) 18 Ves. 293.

(r) *Campbell v. Harding*, 6 Sim. 283.

(q) *Packer v. Packer*, 1 Col. 92; and see ante, p. 117.

(r) Ante, pp. 117, 121.

certificate of such carrying over, which is annexed to the Bank certificate for the purpose of being entered and filed in the Report Office.

To a married Woman.

There are some cases where, although the interest of a party in the fund is not absolute but subject to a contingency, the Court has ordered payment of the money, the contingency being remote and the parties receiving the money entering into a recognizance to refund it in the event of the happening of the contingency; this was done in the case of *Leng v. Hodges* (s), where the right of the parties was subject to the contingency of a female who was then of the age of fifty-five years, and unmarried, having children.

When money has been ordered to be paid out to a party whose title was subject to a contingency.

In the case of *Brown v. Pringle* (t), a legacy to a woman for life, with remainder to her children, was paid out of Court on the petition of the mother and children, the children having attained twenty-one, and the mother being sixty-six years of age. In this case, the fund being small and the contingency remote, Sir J. Wigram, V. C., only ordered the parties to undertake to account for it as the Court should direct in case of other children being born, and no recognizances were entered into.

Having considered the circumstances under which an order for payment of money out of Court may be obtained, it remains to state the manner in which such orders are carried into effect. In the first place, the order must be duly passed and entered, and left with the Accountant-general, who will not act upon a Report Office copy thereof, or a Registrar's office copy, unless an affidavit is produced to him that the original is lost and cannot be found.

Manner in which orders for payment of money are carried into effect.

For each sum of money directed to be paid out, the Accountant-general draws on the Bank by a note, or cheque under his hand, entitled in the particular cause or account out of which the money is to be paid; this note is entered at the Report Office, and marked and countersigned by one of the Registrars of the Court. If the money for which such note is drawn, is not for interest or maintenance, the Accountant-general signs a certificate of such note, which certificate is entered and marked at the Report Office.

At the foot of the note or cheque there is a proviso that if not paid within a month it is void: accordingly, where a cheque was alleged to have been accidentally destroyed, the Court, though not

Cheque becomes void if not acted on.

(s) *Jacob*, 585; see also *Deffiss v. Long*, cited 19 *Ves.* 571. *Goldschmit*, 19 *Ves.* 566; and *Payne* (t) 4 *Hare*, 124.

**Manner of  
Payment.****Manner in  
which stock is  
transferred out  
of Court.**

satisfied with the evidence of its destruction, directed a new cheque to issue, as the former being out of time would not have been paid if presented (*u*).

When any stock is by any order directed to be transferred, or when any stock, Exchequer bills, or India bonds, are by any order directed to be sold; or when any India bonds, Exchequer bills, or specific articles in packages, are by any order directed to be delivered out, the party, or his solicitor, brings to the Accountant-general's Office a certificate from one of the Registrars of the Court of what stock is to be transferred, and to whom; or of the stock, bills, or bonds to be sold, and to what amount; or of the bills, bonds, or specific things in packages to be delivered out, and to whom, and from what cause or account.

In transfers or sales of stock, the Accountant-general sends to the Bank the Registrar's certificate authorizing the transfer or sale which is retained by the Bank, as their authority for permitting the transfer to be made; he then signs a certificate of his having made such transfer, and of the cause or account from which the same is made, and the amount for which the same was sold, to be filed in the Report Office. In sales of stock, the Accountant-general also signs a certificate of the stock sold, and the money raised by such sale.

**Sales of Ex-  
chequer bills.**

On sales of Exchequer bills, or India bonds, the Registrar's certificate is countersigned by the Accountant-general, who, after having received from the Bank a certificate of the particular bills or bonds sold, the amount of the money raised, and the cause or account in which the sale is made, signs another certificate of the particulars of such sale and annexes it to the Bank certificate, to be filed in the Report Office.

**Delivery out of  
Exchequer  
bills.**

When Exchequer bills and such other things as before mentioned are delivered out, the Registrar's certificate is countersigned by the Accountant-general and sent to the Bank; and the Bank having sent to the Accountant-general a certificate of the particulars of such bills, and other things delivered out, and to whom, and from what cause or account, the Accountant-general signs another certificate of such delivery and annexes it to the Bank certificate, to be filed in the Report Office.

Formerly, when any Exchequer bills were paid off or exchanged, it was necessary that the order to receive the principal and interest, and a request that the principal and interest due on the bills might be received, or that the Exchequer bills might be ex-

(\*) *Taylor v. Scrivens*, 1 Beav. 571.

red, should have been left at the Accountant-general's Office. omission to give such directions, caused considerable loss by n of the interest upon the bills ceasing. Accordingly, by a ral Order of the 28th August, 1828 (x), the Bank is now en- to receive the interest upon Exchequer bills and exchange une for new bills, in case such new bills are issued, or to ve the principal and interest due on such bills as cannot be nged without any direction from the Accountant-general, n such case the Bank is to certify to the Accountant-general ut any direction from him for that purpose, the numbers, , and sums of the Exchequer bills so exchanged or paid off, the causes and accounts to which they were respectively d, and also the numbers, dates, and sums of the new bills in exchange, and the amount of the interest or principal, nterest (as the case may be) received on each bill or set of placed to the same cause, matter, or account.

Payment or  
Exchange of  
Exchequer  
Bills.

Bank author-  
ized to ex-  
change Exche-  
quer bills, and  
to receive  
principal and  
interest with-  
out directions  
from the Ac-  
countant  
general.

conclusion it may be convenient here to observe, that when der for payment of money out of Court has been made, an d will not stop the execution of the order ; but from the case rguson v. Tadman (y), it appears that the Accountant-gen- s justified in not complying with an order for payment until has been sufficient time for the appellant to make a special ation for a stay of proceedings to the Court below.

Practice when  
an order of  
payment is ap-  
pealed against.

Orders by G. W. Sanders, Vol. (y) 1 Rus. & M. 331.  
35.

## CHAPTER XLI.

## OF THE PRODUCTION OF DOCUMENTS.

SECTION I.—*Production by the Defendant.*

General principles concerning the jurisdiction to order production of documents.

It is the constant practice of the Court of Chancery before the hearing of a cause, to allow a plaintiff to move for the production of documents relevant to the matters in question, which have been admitted by the defendant's answer to be in his possession or power. This power to order the production of documents arises out of that general jurisdiction for the purpose of discovery which in all proceedings in Equity constitutes a peculiar and important feature, and, in some instances, forms as it were the very foundation for the interference of the Court. So far as this jurisdiction relates to what is required to be stated fully upon the answer itself, and to the disclosure of facts within the defendant's knowledge, the subject may have already perhaps been discussed at sufficient length; but it still remains to inquire briefly into such principles relative to discovery as may serve to explain the right of the plaintiff to inspect deeds and writings in the defendant's possession and the rules of practice regulating applications for their production (1).

Proposition stating the plaintiff's right to discovery.

As the plaintiff's privilege to move for the production of documents is a part of his general right to discovery, it may be convenient to state the proposition in which this right is accurately expressed. According to Sir J. Wigram, V. C., in his treatise upon the subject, "It is the right, as a general rule, of a plaintiff in Equity to exact from the defendant a discovery upon oath as to all matters of fact which being well pleaded in the bill are material to the plaintiff's case about to come on for trial, and which the defendant does not by his form of pleading admit."

Applies to motions for production of documents.

It is obvious, from the terms in which this proposition is worded, that the right of the plaintiff to discovery is not unlimited. In order to explain fully the extent to which it applies it must be

(1) Previous to the final hearing of a cause, the Court orders the production of books and papers only upon two principles; security pending the litigation, and discovery or inspection, for the purposes of the suit in Court. *Watts v. Lawrence*, 3 Paige, 159

nary to investigate what, upon any given state of the plead- In what man-  
are material facts to the plaintiff's case about to come on for ner obtained.  
when a fact may be said to be well pleaded? and what the  
dant in every case admits by his form of pleading? Many  
se subjects have been discussed in former parts of this trea-  
r), and will be found fully explained in Sir J. Wigram's work  
the subject. It is sufficient here to state, that the general  
iples relative to discovery apply as well to motions for the  
otion of documents as to the direct disclosure of facts by  
nswer.

se right of the plaintiff to obtain a knowledge of the contents Former prac-  
cuments in the defendant's possession, was formerly exercised tice.

e bill being so framed, as that it called upon the defendant to  
rth the short contents of the deeds in question or to produce

. If, then, upon the coming in of the answer, the defendant  
ted the possession of certain deeds, and so described them as  
hey could be identified, the Court, unless sufficient disclosure  
een made of their contents by the answer, would have ordered

to be produced (b). The expense of setting out the contents Modern prac-  
deed in the answer has, in some respects, modified this prac- tice.

and the custom is now for the plaintiff to charge generally in  
ill, that the defendant has deeds and documents relating to  
atters in question in his possession (1). Upon this charge,  
rogatories more or less searching, according to the nature of  
ase, are usually introduced so as to extort from the defendant  
ar admission of the possession of the required documents. If  
an admission be obtained, it is then competent for the plain-  
o apply to the Court by motion, that the defendant may pro-  
und leave with the Clerk of Records and Writs the required  
ments (c).

.Ante, p. 600, 691, 828. (c) *Betteson v. Farrington*, 3 P.  
Atkyns v. Wright, 14 Ves. 213; Wms. 363; Tyler v. Drayton, 2 S.  
Ehlon in Princess of Wales v. & S. 309; Evans v. Richard, 1 Sw. 7.  
of Liverpool, 1 Sw. 123.

In a bill for discovery and production of deeds, it is absolutely neces-  
to charge that the deeds have come to, or are in the hands of, the de-  
nt. *Hough v. Martin*, 2 Dev. & Bat. Eq. 226.  
ren the plaintiff alleges that he has never seen an original deed against  
he seeks relief, and prays that the same may be produced for his in-  
ion, the defendant is not bound to make the deed part of his answer, or  
it to it. The plaintiff must, in such case, obtain an order from the  
t for the production of the deed; which order, if disobeyed, will put the  
dant in contempt, and by consequence prevent him from making any  
n in the cause. *Smith v. Thomas*, 2 Dev. & Bat. Eq. 126.

In what manner obtained.

The same principles still apply.

Motion for production is in the nature of an exception to the answer.

General nature of objections to production.

Objections arising from want of sufficient admission of possession.

This change in the mode of proceeding, by which the setting forth of the deed in the answer is rendered unnecessary, has not altered the principles according to which production is ordered. If, under the former practice, the plaintiff could have excepted to the answer for not setting out the required documents, then under the present practice, he will be entitled to move for the production, so that, in the language of Lord Eldon, the motion is in substance the same as an exception to the answer (*d*). The investigation, therefore, of the circumstances under which the plaintiff may move for the production of documents, is very identical with a determination of the extent to which an answer may be obtained from the defendant, and of the particular exemptions which may be urged by him (*e*), as reasons against the required discovery. These objections to the production of documents appear to be, First, that the plaintiff is thereby seeking discovery not relevant to his case; that is to say, that he is requiring something beyond that to which the rules of the Court entitle him (*f*).

Secondly, it may be objected that even supposing the documents to be relevant to the plaintiff's case, and such as he might have an interest in inspecting, still that the defendant is exempted from their production by some particular circumstances arising out of the nature of the documents themselves.

Thirdly, the answer may not contain a sufficient admission of the possession of the documents by the defendant, or there may not be in it a sufficiently accurate description of them to enable the Court to make any order for their production.

The two former of these objections, namely, that the plaintiff is seeking discovery beyond what his general right entitles him to, and that the documents in question are specially exempted, are not confined to motions for the production of documents; but are objections that may also be urged against the disclosure of facts in the answer itself. They arise out of the general principles relating to the right of discovery in Equity. The last objection has reference peculiarly to motions for the production of documents. Moreover, as in all cases the burden is upon the plaintiff, so to make out his case as to preclude an objection of this kind from being raised, it is desirable, in the first instance, to consider objections of this last description. The points to be determined are,

(*d*) *Somerville v. Mackay*, 16 Ves. 387; *Unsworth v. Woodcock*, 3 Mad. 432.

(*e*) *Ante*, p. 823.

(*f*) The limitation of the plain-

tiff's right may be either in consequence of the nature of the suit, or in consequence of the nature of the pleadings when the motion is made.

what is a sufficient admission of possession by the defendant? What constitutes a sufficient description of them to entitle the plaintiff to move for their production? And how he may establish these facts to the satisfaction of a Court?

Different kinds of Objections

As a general rule, the plaintiff must be able to read from the answer an admission that the documents for which the motion is made are in the defendant's possession (*g*) (1), at the time when the motion is made (*h*). In the case of *Story v. Lord J. G. Lennox* (*i*), Lord Cottenham granted the motion for the production of documents, making, however, the following observations: "When the motion was argued before me by way of appeal, it occurred to me that there might be some doubt whether the answer contained a sufficient admission to entitle the plaintiffs to move for the production of the documents in question. To entitle the plaintiffs to an order for that purpose, they must show an admission that the documents which they seek to inspect are in the possession of the defendant, and that they are of a nature to entitle the plaintiffs to an inspection of them; and where an answer is framed so as to meet the form of words commonly used in the interrogatory for that purpose, no question of this kind can arise; but in this case the defendant has not answered the interrogatory except by making his statement as to the documents in the two schedules, and then denying in the words of the interrogatory the possession of any others, so that it is by implication only, and not by any direct admission, that the plaintiffs can show by the answer that the documents fall under the description contained in the answer." The admission of possession must be contained in the answer, and cannot be established by affidavit (*k*). In the case, however, of *Addis v. Campbell* (*l*), Lord Langdale, M. R., allowed a plaintiff, upon a motion of this kind, to verify by affidavit documents neither admitted nor denied by the answer, which tended to establish the plaintiff's right to production.

Admission must be by answer.

Possession cannot be proved by affidavit.

If the documents are in the hands of an agent of the defendant against whom the motion is made, the principle of the Court is, that the possession of the agent is the possession of the defendant agent.

When documents in possession of an agent.

- (*g*) *Darwin v. Clarke*, 8 Ves. 158 [Sumner's ed. 159, Mr. Hovenden's note]; *Erskine v. Bize*, 2 Cox, 226. (*h*) *Heeman v. Midland*, 4 Mad. 391. (*i*) 1 Mylne & Craig, 534. (*k*) *Barnett v. Noble*, 1 J. & W. 227. (*l*) 1 Beav. 261.

(1) *Gibbens v. Ogden*, Halst. Dig. 174.

A reference to documents is not sufficient without also admitting that they are in the custody or power of the defendant. *Ib.* *Watson v. Renwick*, 4 John. Ch. 383.



What sufficient Admission of Possession.



When in joint possession of defendant and others.

Defendant not exonerated from making discovery of their contents.

Defendant must discover the contents of documents in the joint possession of himself and others

himself (m) (1). It seems, however, necessary, that the person in whose custody the documents are, should hold them exclusively for the defendant, against whom the motion is made; for, according to Lord Cottenham, "when documents are stated in the answer to be in the possession of A. B. and C. you cannot order that A. shall produce them, and that for the best possible reason, namely, that he could not produce them (n);" and, upon the same principle, where the person who holds them is the agent of other persons as well as the defendant, against whom the motion is made, it seems that no order can be made for the production of such documents (o). This principle, however, does not extend so as to exonerate a defendant from making a discovery of any knowledge he may be able to obtain by inspecting documents in the joint possession of himself and others. The case of *Taylor v. Rundell* (p), has been before the Court upon several occasions, and the unanimous opinions of the different judges explain very clearly the principles upon this point.

In that case, the plaintiff was the executor of the leases of certain mines. The bill was for an account. The defendants were the lessees of the mines; they were also directors of the association for working the mines, and proprietors and shareholders in the concern. Under these circumstances, as the case came ultimately before Lord Lyndhurst, the defendants, in their examination before the Master, represented that they were unable, without the inspection of certain documents, to give any further information than they had already done; that such documents were in the possession of the secretary and under the joint control of themselves and their co-directors of the mining association, and that the other directors refused to allow the defendant to inspect them. The question was, whether this was a sufficient examination; Lord Lyndhurst held that it was not, for as directors they had a right to the inspection of the documents at any time, the possession of the secretary was their possession, and their co-directors had no right to exclude them. His Lordship concluded by saying, "A party is bound to inspect and answer as to the contents

(m) *Murray v. Walter*, 1 Cr. & P. 125; *Morrice v. Swaby*, 2 Beav. 500; *Wright v. Mayer*, 6 Ves. 281; *Fenwick v. Reed*, 1 Mer. 114; *M'Cann v. Bruce*, 1 Hogan, 129.

(n) Cr. & Ph. 124.

(o) See however the case of *Wal-*

*burn v. Ingleby*, 1 My. & K. 61, and the observations of Lord Cottenham thereon in *Murray v. Walter*, C. & P. 125.

(p) Cr. & Ph. 104; 1 Ph. 222; 1 Y. & C. 128; 11 Sim. 391.

(1) *Eager v. Wiswall*, 2 Paige, 369, cited post, 2057, note.

of all documents that are in his possession or power; and all which he has a right to inspect, provided he can enforce that right, are in his power."

What sufficient Admission of Possession.

Lord Cottenham, in the same case (*p*), exhibits very clearly the difference between ordering a defendant to produce a document which he has only a joint possession with others, and ordering a defendant to disclose the result of his inspection of documents, which, though not in his exclusive possession, he is still entitled to peruse, saying, — "It is true, that the rule of the Court adopted from necessity, with reference to the production of documents, is, that if a defendant has a joint possession of a document with somebody else who is not before the Court, the Court will not order him to produce it, and that for two reasons; one is, that a party will not be ordered to do that which he cannot or may not be able to do (*q*); the other is, that another party not present has an interest in the document which the Court cannot deal with; but the rule does not apply to discovery, in which the only question is, whether, as between the plaintiff and the defendant, the plaintiff is entitled to an answer to the question he asks; for if he is, the defendant is bound to answer it satisfactorily, or at least show the Court that he has done so as far as his means of information will permit."

Distinction between ordering a defendant to produce documents, and ordering him to disclose their contents.

It seems, however, that although where a defendant has not the exclusive right to the possession of a document, the Court will not order its production by him, yet if the exclusive right to the possession is only prevented by the document being retained by an agent or solicitor, then the Court will order production by the defendant, taking care to give him sufficient time to compel the delivery from the person wrongfully retaining it (*r*). The consequence of this rule is, that it is not usually necessary to make an attorney a party to a suit, because he has the title deeds of a defendant in his possession, although it seems that it may become so under particular circumstances. Generally speaking, and *prima facie*, it is certainly not necessary to make an attorney a party to a bill seeking a discovery and production of title deeds merely because he has them in his custody, since the possession of the attorney is the possession of the client; but cases may arise where such a proceeding becomes advisable, as if the attorney withholds the deeds in his possession, and will not deliver them to his client on his applying for them (*s*).

When possession wrongfully withheld by an agent.

When deeds are in possession of defendant's attorney.

(*p*) Cr. & Ph. 111; but see *Walburn v. Ingleby*, 1 M. & K. 61.  
(*q*) *Princess of Wales v. Earl of Liverpool*, 1 Sw. 123, & 1 Wils. 113.

(*r*) *Taylor v. Rundell*, 1 Ph. 225; Cr. & Ph. 113; see also *Lopez v. Deacon*, 6 Beav. 254.  
(*s*) *Fenwick v. Read*, 1 Mer. 125.

What sufficient Admission of Possession.

When others have an interest in them.

When the required documents are abroad.

What is a sufficient description of documents.

Reason why description necessary.

In the recent case of *Richardson v. Hastings* (t), where the suit was by one member of a club on behalf of himself and the others, with the exception of two members, who were defendants. A motion for the production of documents was resisted by the defendants on the ground that all the members of the club were interested in them, and that they could not be produced in their absence. Lord Langdale, M. R., overruled the objection, stating that it had been determined that the other members of the club were not, under the circumstances of the case, necessary parties. It may be observed, the plaintiff was put upon an undertaking not to use the documents for an alleged object, collateral to the purposes of the defendant. From the case of *Brown v. Perkins* (u), it seems that in a suit for an account of a partnership between two solicitors, it will be no objection to a motion for the production, that the clients of the firm have an interest in them.

Lastly, it may be observed that the mere circumstance of the documents being abroad, is no answer to a motion for their production; but in such a case, reasonable time will be given the defendant to bring them to this country, and if he does not comply with the order, the Court will consider it the same as if he had had them here in the first instance, and had refused to produce them (x) (1).

The plaintiff having shown that the answer contains a sufficient admission of the possession of documents, it is next incumbent upon him to show that they are sufficiently described so as to enable the Court to make an order for their production (2). According to Lord Eldon, in *Atkyns v. Wright* (y), "the practice formerly was, that where the answer did not describe, either in the body or by schedule, which is part of the answer, the deed of which a production was desired, the Court would not make an order upon motion for the production, as it could not determine by looking at the answer or the schedule whether that production had been made or not."

(t) 7 Beav. 354.

(u) 2 Hare, 540.

(x) *Farquarson v. Balfour*, 1 T. &

R. 190; *Freeman v. Fairlie*, 3 Mer. 44.

(y) 14 Ves. 213.

(1) *Eager v. Wiswall*, 2 Paige, 369.

(2) A mere reference to deeds or papers is not sufficient without describing them. *Gibbens v. Ogden*, Halst. Dig. 174. They must be described with reasonable certainty in the answer, or in the schedule annexed to it, so as to be considered, by the reference, as incorporated in the answer. *Watson v. Renwick*, 4 John. Ch. 383.

In addition to the above reasons for compelling documents to be described in the answer, it seems necessary that there should be an adequate description of them for the purpose of enabling the Court, the event of its ordering production afterwards, to determine whether due compliance with its order, has been made by the defendant.

What Description sufficient.  
Reason for requiring a sufficient description.

As the want of a proper description of documents admitted to be in the defendant's possession, precludes the plaintiff from moving for their production; such a defect in itself renders the answer insufficient (a). Consequently, when the answer does not describe documents the plaintiff may wish to inspect, the proper course for him to adopt is to except to the answer before making a motion for production.

Want of description renders answer insufficient.

Assuming then that the answer sufficiently admits possession of the required documents, and also properly describes them, the next subject for investigation is, what is the nature of the right of the plaintiff to the documents themselves, or his interest in inspecting them, which will induce the Court at his request to order the defendant to produce them. This right or interest it is incumbent on the plaintiff to establish, and failing to do so, the defendant may object to the production upon the ground that this right or interest has not been shown (1).

What is sufficient interest in documents to enable plaintiff to move.

It has been before stated, that the defendant may also urge special grounds of exemption as reasons why the motion should not be granted; the onus, however, of proving such objections to the required discovery rests upon the defendant, and the whole subject, which is one of considerable difficulty, will be rendered more intelligible by carefully keeping in mind the distinction between such objections as relate to a defect in the establishment of his own right to the production by the plaintiff, and such objections as relate to the proof by the defendant of any special ground of objection.

It will be convenient first, to consider the right or interest in the document which the plaintiff must show. In general this right or interest is sufficiently established by an admission of the defendant's, that the documents in question are relevant to the plaintiff's case.

In the case of *Smith v. Duke of Beaufort* (b), Sir J. Wigram, C., observes, "That according to his apprehension of the practice, Admission of relevancy sufficient.

(a) *Atkyns v. Wright*, 14 Ves. 213. (b) 1 Hare, 519.

(1) See *Gibbens v. Ogden*, Halst. Dig. 174; *Watson v. Renwick*, 4 John. 383.

What sufficient Interest in the Documents.

tice of the Court, an admission in general terms that the documents in the schedule are relevant to the plaintiff's case, throws upon the defendant who makes that admission the onus of excusing himself from producing the documents in the schedule. The answer in that case admitted that, the documents in the schedule were relevant to the plaintiff's case, and that admission taken alone, in his opinion, *prima facie*, entitled the plaintiff to inspect them. So also Sir John Leach, V. C., in *Tyler v. Drayton* (c), said, that where a defendant referred to his schedule as containing all deeds, papers, &c. in his custody or power relating to the matters in question, there the plaintiff was entitled to the inspection of all such deeds, papers, &c. as of course, unless it appeared by the description of any particular instrument in the schedule, or by affidavit that it was evidence not of the title of the plaintiff but of the defendant, or that the plaintiff had otherwise no interest in its production. In the cases just mentioned it has been assumed that the admission of relevancy is unqualified; but this admission may be accompanied by statements in the answer tending to establish, either that the plaintiff has not that right or interest in the documents which entitles him to their production, or that the defendant has some special grounds for protection.

When admission of relevancy is qualified.

In the event of these qualifying statements, having reference to want of interest in the plaintiff, the question arises what the nature of that interest is. In the case of *Adams v. Fisher* (d), the plaintiff, as personal representative of a deceased testator, stated by his bill that the defendant Fisher had acted as his solicitor, and had in that character received various sums on account of the testator's estate, for which he had not accounted to him: and the bill alleged that the same defendant had in his possession books and papers relating to the testator's estate, and called for a schedule and production of such books and papers, and also prayed an account.

Whether defendant can protect himself from production of documents by denying title of the plaintiff.

The defendant Fisher admitted the possession of documents relating to the testator's affairs, and set out a schedule of them; he insisted, however, that he was not the plaintiff's solicitor, but the solicitor of one Pinckard, who had been authorized by the plaintiff under a power of attorney to collect the rents of the testator's estate, and, under these circumstances, he submitted that the plaintiff had no right to call for the production of the documents or any of them. The plaintiff moved for a production of the documents in the schedule, and Lord Cottenham refused the motion, concluding his judgment by saying, "Here the defendant has denied the

(c) 2 S. & S. 310.

(d) 3 M. & C. 526.

plaintiff's interest, he has on the record stated that which as it stands, in my opinion, excludes the plaintiff from instituting this suit against him. As long as that stands, I think the plaintiff is not entitled to see the documents." What sufficient Interest in the required Documents.

It will be observed here, that the plaintiff's right as against this defendant to an account of the estate to which the documents related was contingent upon the truth of the allegation in the bill. The defence was a denial that the defendant had acted as the plaintiff's solicitor, or in other words, a denial of the plaintiff's whole right to sue; and although this defence was raised by answer, and not by plea, still the plaintiff was refused the discovery until he had established his title.

We have before had to consider the rule that a defendant who submits to answer, must answer fully (e); and the meaning of it seems to be, that where the defendant sets up, *by answer*, a defence extending to the entire subject of the suit, as, for instance, that the plaintiff has no right to equitable relief—or has no interest in the subject, or that the defendant is a purchaser for a valuable consideration, then notwithstanding the answer denies all right in the plaintiff to sue, still the defendant must discover every thing that would be useful to the plaintiff for the decree to be made in the event of the defence to the whole bill failing. Lord Lyndhurst, with reference to this principle that a defendant must answer fully, says, "I consider, therefore, the rule as settled, and for this, among other reasons, that if the defence which a party sets up by the answer should be decided against him, it is of the utmost importance that all consequential matters, which are matters which are material for the purpose of the decree, should receive in answer" (f).

Now it is obvious that if the Court, in deciding upon motions for the production of documents, is governed by the same principles as it is in determining questions concerning the insufficiency of answers, then this case of *Adams v. Fisher* is opposed to the principle that a defendant who submits to answer, must answer fully.

Sir J. Wigram, V. C., in his "Points on the Law of Discovery" (g), elaborately criticises the decision in this case, and considers it as introducing an exception to the general rule, which entitles a plaintiff to discovery in support of his own case. The reason why this case may be considered to be contrary to the general principles of the Court, seems to be shortly this:—The dis-

(e) Ante, p. 826.

(f) *Lancaster v. Evors*, 1 Ph. 352;

— *v. Harrison*, 4 Mad. 252; *Ovey*

*v. Leighton*, 2 S. & S. 234.

(g) P. 91.

When defendant denies the title of the plaintiff to the

le that a defendant must answer fully.

covery in question would have been applicable to determine the amount or extent of the demand of the plaintiff, and was therefore material for the purpose of the decree sought by the bill. Although, therefore, the amount of the demand was a subordinate point in the cause, and the right of the plaintiff to sue was the principal subject of dispute, still the defendant, by submitting to answer, had made himself liable to give, before the decree, discovery both as to the principal, and also as to the subordinate points in the cause. The refusal, therefore, of the Court to order production of the required document, exempted the defendant from giving discovery for the purpose of the suit concerning one of the issues about to come on for trial.

Lord Lyndhurst, in the case of *Lancaster v. Evors* (*h*), had to determine whether the authority of *Adams v. Fisher* (*i*) would extend so as to exonerate a defendant, who stated by his answer that he was a purchaser for a valuable consideration from giving a discovery of the sums that he had paid for his incumbrances. Lord Lyndhurst held that he must answer fully; and with reference to the passage before quoted from the judgment of Lord Cottenham, he said, "I think it is plain from these passages that Lord Cottenham considered that the application then made to him, stood upon different grounds from an exception to an answer. What I understand him to say is this: 'If you had asked by your bill for the contents of the documents, and the defendant had refused to set them out, and you had come here upon exceptions to the answer, the case might have been different; but you have not excepted to the answer, nor could you, for the answer goes to the full extent of what is required by the bill; but you come by way of motion that the documents may be produced. Now that is not a motion of course, but one on which the Court will exercise its discretion; and if upon the whole record the Court is satisfied that it would not be proper that the documents should be produced, it will refuse the motion.' Such was the distinction drawn in that case, and it was upon that distinction the judgment rested" (*k*).

There does not seem to be any other case tending to establish a distinction between the right of a plaintiff in obtaining a discovery by motion for the production of documents, and his right to obtain discovery directly upon the answer. Indeed, in general, it has been the practice of the Court to test the right of the plain-

(*h*) *Ubi supra*, and see *Hue v. Richards*, 2 Beav. 306; *Somerville v. Mackay*, 16 Ves. 382.

(*i*) *Ubi supra*.  
(*k*) 1 Ph. 353.

tiff to the production of documents by considering whether he could have compelled the defendant to set out their contents upon his answer.

What a sufficient Interest in the Plaintiff

As the motion is made exclusively upon the admissions contained in the answer, it seems clear, that if the defendant positively deny the possession of documents relative to the plaintiff's case, no order for production can be made.

Where there is a positive denial of possession.

The degree of interest which the plaintiff must have in the documents, the production of which he requires, is exhibited by an observation of Sir John Leach, V. C., which is frequently quoted, namely, that the Court makes interlocutory orders for production only upon two principles, security pending litigation, and discovery for the purposes of the suit. In the case of *Lingen v. Simpson (l)*, the whole object of the suit was, that the plaintiff might be declared entitled to a copy of a certain book for the purposes of his trade. A motion was made for the production of this book, and refused by Sir John Leach, after making the above observation, and saying that the present application sought an anticipated decree. In cases of this description, although undoubtedly the plaintiff has an interest in the documents in question, yet there seems no doubt that it is not an interest for the purposes of the suit of a kind which can give him a right to the production.

When the plaintiff has an interest in a document, but not such as to entitle him to move for production.

Cases of more difficulty under this head occur in suits to set aside deeds or legal instruments upon the ground of fraud or other equitable circumstances. In such cases has the plaintiff a right to the production of the instrument impeached by the bill? In the case of *Tyler v. Drayton (m)*, Sir John Leach decided that he had not. Where, however, the deed sought to be set aside is alleged by the plaintiff to contain on the face of it evidence of the fraud or other fact upon which it is sought to be set aside, then, unless the defendant by his answer expressly denies that the deed does exhibit such evidence, it seems that an order will be made for its production (n).

Whether the plaintiff in a suit to set aside a deed has a right to the production.

The case of *Balch v. Symes (o)* is sometimes referred to in argument as an authority for the proposition, that where the object of the suit is to impeach a deed, the plaintiff is entitled, for reasons founded in the object of the suit alone, to have the deed produced upon motion. Upon this point the observations of the present Vice-Chancellor Wigram, in his work upon Discovery (p), are peculiarly worthy of attention.

(l) 6 Mad.  
(m) Ubi supra.  
(n) *Kennedy v. Green*, 6 Sim. 7; *Fencott v. Clarke*, 6 Sim. 8; *Beckford v. Wildman*, 16 Ves. 438 [Sumner's ed. notes].  
(o) T. & R. 87.  
(p) P. 226.



In Suits to im-  
peach Deeds.

The case of *Balch v. Symes* does not, nor do the cases above cited when carefully examined, sanction any such general proposition; in fact, they negative any such conclusion. The proposition, indeed, involves an absurdity, for if it were founded, it would follow that a plaintiff by merely filing a bill purporting to impeach a deed might, without more, exact a production of it; cases of this class must, it is conceived, be governed by the general rules of the Courts and not by any rules peculiar to the cases themselves.

When the  
deed itself is  
alleged to con-  
tain evidence.

Where a deed is impeached upon grounds, the evidence of which is alleged to be upon the deed itself, as in *Kennedy v. Green*, an inspection before the hearing, limited according to the exigences of the particular case, would probably upon principle be permitted, unless the answer effectually displaced the charges affecting it. Where a conveyance is impeached on the ground of the relation in which the parties stood to each other, as that of trustee and *cestui que trust*, or solicitor and client, or on any other ground  *dehors* the deed, a production of the deed would in general be immaterial to the issue, and would not, it is conceived, be ordered (g).

Where deed is  
alleged to have  
been obtained  
by fraud.

In the recent case of *Bassford v. Blakesley* (r), Lord Langdale, M. R., said, "I perfectly agree that where a bill alleges that deeds have been obtained by fraud, and the answer entirely denies the fraud and states the deeds, the plaintiff is not, in that situation of things, entitled to an order for their production. On the other hand, it is not necessary, in order to entitle the plaintiff to the production of the deeds, that the defendant should admit that there has been fraud. The Court must look to the circumstances of each case;" and in the case then before him, he made an order for the production of the deeds that were impeached (1).

When docu-  
ments are not  
wanted for the  
purpose of de-  
termining  
what the de-  
cree should be.

Another case (in which the plaintiff having some interest in the documents sought to be produced, has not that kind of right which entitles him to their production) exists when the required documents are not wanted for the purpose of proving the plaintiff's right to a decree, but for the purpose of carrying into effect the decree sought to be obtained. Cases of this kind must be distinguished from those like *Adams v. Fisher* (s), where the documents are required for a *subordinate* point in the decree, but still for a

(g) See also the cases of *Neate v. Latimer*, 2 Y. & C. ; Exch. Rep. 257; *Bligh*, 149; *Pilkingdon v. Hims- worth*, 1 Y. & C. Exch. Rep. 612; *Castor v. Goetze*, 2 Keen, 581, and observations upon these cases in *Wilgram on Discovery*, p. 227.  
(r) 6 Beav. 131; and see *Gill v. Eyton*, 7 Beav. 155.  
(s) Ante, p. 2033-4.

(1) It is the practice of the Court to order deeds and papers contested as false and fraudulent, to be brought into Court for inspection. *Ap- thorpe v. Comstock*, 1 Hopk. 144; S. C. 8 Cowen, 386.

oint in the decree. In the cases now considered, the discovery is supposed to be not for the purpose of determining in any respect what the decree is to be, but for the purpose of enabling the plaintiff to carry it into execution. Under these circumstances there is clearly no reason why the plaintiff should inspect the documents before the hearing of the cause (t).

When sufficient Title in the Plaintiff.

The case of *The Attorney-general v. Ellison* (s) seems to be somewhat at variance with the foregoing principles. There the general object of the suit was to set aside two leases, and a motion was made for the production of four deeds relating to the leases admitted to be in the possession of the defendants, and by the description of them appearing to be assignments of the leases sought to be set aside. The V. C. of England ordered production saying, "If the Attorney-general succeeds, every portion of the legal estate in the terms for 999 years must be assigned or surrendered, so that the leases may be no longer set up, he therefore has a direct interest in the deeds in the defendant's possession. They do not relate solely to any separate and independent title of the defendant, and therefore they must be produced."

This case is criticised by Sir James Wigram, V. C., upon the ground that the plaintiff could not be entitled to know the contents of the derivative leases, until, by proving his right to rescind the original leases, a purpose for which it was not suggested that the derivative leases could assist him, he had established an interest in the leases also (t).

Lastly, before leaving this branch of the subject, it is desirable to mention, that in many cases the extent of discovery to which a plaintiff, at any particular period of the cause, is entitled, depends upon the state of the pleadings. Thus, if a demurrer to the whole bill be put in, as such a state of the record in itself is an admission of every fact properly pleaded in the bill, the plaintiff has no right to any discovery, consequently no motion for the production of documents can be made. So, also, if the defendant pleads a pure affirmative plea, that is, if the defendant admits the whole case made by the bill, but states some fact not in any manner denied by the bill as a defence to the whole case, then the plaintiff has no right to discovery (u). There is, however, frequently considerable difficulty in determining with precision what degree of discovery a plaintiff is bound to afford upon a special state of the pleadings. Questions of this kind do not frequently arise upon a motion

How the right to production affected by the state of the pleadings.

In case of an affirmative plea.

(t) Wigram on Discovery, p. 211.

(s) 4 Sim. 238.

(t) "Points on the Law of Discov-

ery," 214.

(u) Ante, p. 707.

How affected  
by the state of  
the Pleadings.



for the production of documents, and they have, moreover, already been discussed at some length in the Chapters upon pleas and answers, so that it will only be necessary now to state, that in general motions for the production of documents are in the nature of exceptions to the answers upon which they are founded; and if the plaintiff's case upon the pleadings is such that he would be entitled to have the contents of the required documents set forth upon the answer, then he will have a right to call for their production. Thus if the defendant pleads some legal fact which the plaintiff by his bill confesses in part, but avoids by stating some equitable reason, as for instance fraud, why such legal bar should not avail, there seems no doubt but what the plaintiff would be entitled to move for the production of documents tending to establish the fraud or other equitable defence (x).

Negative  
pleas.

In the case of pure negative pleas the extent of the discovery to which the plaintiff is generally entitled, and the circumstances under which the charge concerning documents must be answered have already been fully discussed (y), so that it need now only be stated that, in such cases, when an answer to the charge concerning documents can be compelled, a motion for their production may be made.

Special ex-  
emptions from  
discovery.

We now come to a consideration of those objections to motions for the production of documents which arise out of the peculiar nature of the documents themselves. With respect to objections of this kind, inasmuch as they usually depend upon some special immunity of the defendant with reference to the discovery sought to be obtained, the onus of proving the immunity is thrown upon the defendant making the objection. The first objection of this kind to be considered is, that the required documents relate exclusively to the defendant's title and not to the plaintiff's case (1). If they relate both to the plaintiff's case and also to the defendant's, then it seems that, even though they be the very foundation of the defendant's title, still they must be produced (z).

That required  
documents re-  
late exclusive-  
ly to the defen-  
dant's case.

We have before seen that the plaintiff has no right *a priori* to the production of documents not evidencing his own case, and the last sentence shows that as to documents which do evidence his own case he is entitled to their production, even though they be

(x) Ante, p. 707 and 771.

(y) Ante, p. 701, 707.

(z) Smith v. The Duke of Beau-

fort, 1 Hare, 507; 1 Ph. 209; Burrell  
v. Nicholson, 1 M. & K. 680.

(1) Story Eq. Pl. § 858, § 859.

he title of the defendant. The objection, therefore, that documents relate exclusively to the title of the defendant is really included in the objection heretofore considered, that the required documents do not relate to the plaintiff's case. When, however, a motion is in fact made for the production of documents which relate to the defendant's title and not to the plaintiff's case, the objection is usually stated in the form of a special exemption of the defendant exonerating him from the production of his title-deeds, and not in the more general form that the documents required do not evidence the plaintiff's case.

Of Documents.  
relating to  
Defendant's  
Title.

The case of *Bolton v. The Corporation of Liverpool* (a) is a leading authority on this subject. In that case, on a bill of discovery in aid of the defence to an action brought by a corporation for the recovery of town dues, the defendants by their answer admitted that they had in their custody, relating to the matters mentioned in the bill, certain grants and deeds, which they alleged were the title-deeds and documents evidencing and showing the title of the corporation to the town and lordship of Liverpool, and to the town dues and customs. A motion for the production of these amongst other documents, was first made before the V. C. of England (b), upon which occasion his Honor concluded his judgment by saying:—"Inasmuch as these documents are described as being documents which evidence the title of defendants, and as nothing is to be inferred from any passage in the answer that they evidence the title of the plaintiffs, (which they might do though they evidence the title of the defendants,) I am of opinion that, with respect to all the documents contained in the third schedule, an inspection ought not to be granted."

A similar motion by way of appeal was made before Lord Brougham (c), whereupon his Lordship said, "I entertain the same view of this question which his Honor did when he refused the application. I take the principle to be this; a party has a right to the production of deeds sustaining his own title affirmatively, but not of those which are not immediately connected with the support of his own title, and which form part of his adversary's. He cannot call for those which, instead of supporting his title, defeat it by entitling his adversary (1). Those under which both claim he may have, or those under which he alone claims. Thus, an heir at law cannot in that character call for the general inspec-

General principles concern-  
ing documents  
relating to de-  
fendant's title.

(a) 1 M. & K. 88.  
(b) 3 Sim. 467.

(c) 1 M. & K. 88.

(1) Story Eq. Pl. § 858, § 959.

*Of the Production of Documents.*

tion of deeds in the possession of a devisee (*d*). The plaintiff here does not claim anything positively or affirmatively under the documents in question; he only defends himself against the claims of the corporation, and suggests that the documents evidencing their title may aid his defence. How? By proving his title, he says. But how can these documents prove his title? Only by disclosing some defect in that of the corporation. The description of the documents is, that they rebut or negative the plaintiff's title; they are the corporation's title, and not his, and they are only his negatively by failing to prove that of the corporation. He rests on the right which he has in common with all mankind, to be exempt from dues and customs, and he says, prove me liable if you can. The corporation have certain documents which they say prove this liability. He cannot call for the documents merely because they may, upon inspection, be found not to prove his liability, and so to help him, and hurt his adversary, whose title they are."

The authority of this case has never been disputed, and the grounds of distinction between it and the case of *Smith v. Duke of Beaufort* (*e*), exhibit the principles of the Court upon this subject. In that case also, the bill was for discovery in aid of an action at Law. The subject of the action at Law was the claim of the Duke of Beaufort to a sum of 4*d.* for every wey of coal raised in a particular manor. The plaintiff disputed the right thus claimed by the duke, and insisted by his bill upon three matters of fact, tending to disprove the validity of the custom claimed by the duke. The duke, by his answer, admitted the possession of certain documents relating to matters in the bill: but he said that such several documents were the title-deeds, evidences, and muniments of or belonging to him as the tenant for life as aforesaid, and the same respectively evidenced or related to his right and title as tenant for life, and of his son as tenant in tail in remainder to the said estates and hereditaments, and to the said duty or payment of 4*d.* per wey, and did not in any manner evidence or relate to any estate, right, or title whatsoever of or belonging to or claimed by the plaintiff; nor were the same in any way material or necessary to or for the plaintiff's defence in the action; nor had the plaintiff any interest whatsoever in the same or any of them, and he submitted that the plaintiff was not entitled to the production thereof.

(*d*) See *Lady Shaftesbury v. Arrowsmith*, 4 Ves. 66, [Sumner's ed. notes.] (*e*) 1 Hare, 507; and see *City of London v. Thomson*, 3 Sw. n.

A motion for the production of these documents was made before Sir James Wigram, V. C. The judgment is too long to be quoted, but the following passage will exhibit the principle upon which the production was ordered: "The plaintiff by his bill has made three specific points which I have already noticed. No one of these points nor the conclusion to which they lead, can with any approach to accuracy of language be described as an estate, right, or title of or belonging to or claimed by the plaintiff. The answer denying only that the documents relate to any estate, right or title of or belonging to or claimed by the plaintiff may be studiously evasive. The fact is, that the plaintiff has no case to establish except a negative of the defendant's claim, and the three points he makes by his bill constitute a case by way of evidence only leading to that negative. The plaintiff then has a right to all such discovery as will enable him to prove that case, and consistently with the answer the documents may do that" (f).

Of Documents  
relating to  
Defendant's  
Title.

Where the  
plaintiff has no  
case except a  
negative of the  
defendant's  
claim.

In conclusion his Honor said, "That his judgment proceeded upon this, that the admission of relevancy *prima facie* entitled the plaintiff to inspect the documents, and that the protection which the duke claimed was not claimed in terms sufficiently definite and precise to entitle him to that protection." A similar motion was made by way of appeal before Lord Lyndhurst and refused upon the same principles.

The recent case of *Harris v. Harris* (g) is another instance of the same principle; the bill was for an account in respect of an alleged partnership; the defendant by his answer denied the partnership. He admitted the possession of books, accounts, and documents, relating to the business which formed the subject of the alleged partnership, but asserted that they related exclusively to his own title, and to matters connected with his own property and affairs, in which the alleged partner had no interest; and that they did not relate to any business carried on in partnership or in conjunction with the alleged partner. A production of these documents was, under these circumstances, ordered, upon the ground that it was consistent with the answer that they might afford evidence for the plaintiff of his case. Sir J. Wigram, V. C., concluded by saying, "The mere use of the word title — the mere allegation that the documents relate exclusively to the defendant's title — is of no avail to the defendant in resisting the production, if that conclusion be opposed by the character of the documents, or if it be not supported by specific averments exclud-

(f) See also *Bannatyne v. Leader*, 10 Sim. 230. (g) 3 Hare, 179.

Of Documents  
relating to the  
Defendant's  
Title.

Productions  
when refused.

ing all probability that the documents would permit evidence in support of the plaintiff's case. The Court in a case like this must exercise its own judgment as to the effect which the evidence may have."

On the other hand, when there is nothing in the nature of the suit to lead to a supposition that the required deed will evidence the plaintiff's case, and it appears to be the defendant's title, it is clear that no order will be made for its production; thus in *Lloyd v. Wait* (*h*), where a party claiming as heir to a mortgagor filed a bill to redeem, and the answer denied his title as heir, the V. C. of England held, that he must establish his title before he could see the deed; "that is, he must first show that he has an interest in the deed."

The result of the cause is thus stated by Sir J. L. Knight Bruce, V. C. (*i*). "If it be with distinctness and positiveness stated, in an answer, that a document forms or supports the defendant's title, and is intended to be or may be used by him in evidence accordingly, and does not contain anything impeaching his defence, or forming or supporting the plaintiff's title, or the plaintiff's case, that document is, I conceive, protected from production, unless the Court sees upon the answer itself that the defendant erroneously represents or misconceives its nature; but where it is consistent with the answer that the document may form the plaintiff's title, or part of it may contain matter supporting the plaintiff's title or the plaintiff's case, or may contain matter impeaching the defence, then, I apprehend, the document is not protected; nor, I apprehend, is it protected if the character ascribed to it by the defendant is not averred by him with a reasonable and sufficient degree of positiveness and distinctness."

Effect of a reference by answer to a document for greater certainty.

Another question of some importance occurs upon this branch of the subject, namely, if a defendant states in his answer that he has in his possession a document relating to his own title, and refers to it for greater certainty of its contents, whether the mere fact of that reference will entitle the plaintiff to its production? It is assumed that the document is only alluded to in the answer as a part of the defendant's case, and not as a part of his examination to the interrogatories in the bill, and under these circumstances the doubt is, whether the reference for greater certainty

(*h*) 12 Sim. 103; see *Hue v. Rickards*, 2 Beav. 305; and *Glegg v. Legh*, 4 Mad. 493.

(*i*) *Combe v. Corporation of London*, 1 Y. & C. 651; and *S. C.* 4 Y. & C. 139, Exch. Rep.

gives to the plaintiff a right which he would not otherwise have had to the production of the document referred to (1). Effect of a Reference to a Document.

The case of *Atkyns v. Wright* (i) was a bill for an account of the execution of a trust under a conveyance, containing charges of fraud, which charges of fraud were denied by the answer. The defendant admitted the possession, amongst other deeds, of a certain indenture, purporting to be a release to him and other persons, to which by his answer he referred when it should be produced. A motion was made for the production of this amongst other documents, whereupon Lord Eldon said, with regard to this particular deed, "The bill does not appear to have been drawn with the knowledge that such a deed existed, and the fact of its existence comes out by the answer, but the answer does not contain an offer to produce that deed as the Court shall direct. This defendant has not done what was done in a late case, where the defendant admitting that he had the deed, and was ready to produce it if the Court should require him to do so, Mr. Fonblanque contended, that he had not by that form of pleading enabled the Court to dispense with the judicial discretion to call for the production or not, and I thought that was not a voluntary offer that ought to fix the defendant, but that it was a submission to the discretion of the Court, and no dispensation with the discretion of the Court not to order the production if it should not be thought proper to make it. Here is no room to say the answer leaves to the discretion of the Court, whether having regard to the justice due to both parties, the Court would call upon the defendant to produce that deed. In another case, I said, that whether the party was or was not capable of setting forth the contents of the instrument, he had in a great measure set them forth, and for the truth of what he set forth he referred to the instruments; there was, therefore, no question of production, as he made the instrument part of his answer. But this defendant has said in substance, that he denies all this fraud, negligence, and culpable conduct with which he is charged, and whether his answer is true or false in that respect, here is a deed that is not impeached, namely, a release of all claims whatsoever as in the said indenture will

(i) 14 Ves. 211.

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(1) Story Eq. Pl. § 859, § 860, 860 a. and notes.

It is a matter of course to allow the plaintiff to inspect the books and papers of the defendant referred to in his answer, and thus made a part thereof. And the defendant may be compelled to produce them within a reasonable time although they are in the hands of his agent in a foreign country. *Eager v. Wiswall*, 2 Paige, 369.



Effect of a Reference to a Document.

appear, and claiming the same benefit as if he had pleaded it. He must produce that instrument at the hearing of the cause, but his answer means only that in this stage he does not put his defence upon a plea with profert, stating merely, that there is such an instrument which is to be his defence if he shall produce it, not otherwise. My opinion is, that upon this bill and answer the plaintiff cannot compel the production in this stage of the case."

From this case itself, the inference seems to be, that production of a deed relating exclusively to the defendant's title will not be ordered unless the defendant, by his answer, voluntarily offers to produce it; and further, that the mere fact of referring (which was done in the case) does not constitute such an offer as will fix the defendant.

In the case of *Hardman v. Ellames (k)*, the defendant, by his answer, stated the effect of several deeds, and concluded his statement in these words:—"As by the said several fines and the proclamations made thereon respectively, now remaining of record in the said Court, and by the said several deeds hereinbefore mentioned, to which for greater certainty the defendant craves leave to refer, when produced will appear." Upon these words, the question arose whether they gave the plaintiff a right to move for the production of these documents, the effect of which was thus stated. The motion was first made before Sir C. Pepys, M. R., who ordered the production. An appeal from this order was made to the Lords Commissioners, Shadwell and Bosanquet. The case was elaborately argued, and all the authorities upon the subject are there collected. The claim of the plaintiff to the production seems to have been rested entirely upon the effect of the above reference, and not upon the nature of the deeds themselves. The judgment was delivered by the Lord Commissioner, Shadwell, who concluded his judgment by saying, "It appears, therefore, upon a review of the cases, to be perfectly settled that where a defendant, in his answer, states a document shortly or partially, and for the sake of greater caution refers to the document in order to show that the effect of the document has been accurately stated; in such a case the Court will order the document to be produced. It was said in the present case, that the document ought not to be produced, because it only manifests the defendant's title; but the answer to that is, in the first place, that it may by possibility do something more than merely manifest the defendant's title. It

(k) 2 M. & K. 745; see also *Bettison v. Farrington*, 3 P. Wms. 364; 7; *Welford v. Stainthorpe*, 2 Beav. 587; *Lord Eldon in The Princess of Hodson v. Earl of Warrington*, 3 P. Wales v. the Earl of Liverpool, 1 Sw. Wms. 35; *Evans v. Richards*, 1 Sw. 121.

would be a strange thing to say that a defendant should, at the hearing, have the advantage of other parts of the deed than those set forth in the answer, and that the plaintiff, who looks to the answer for information, should not be at liberty to avail himself of a knowledge of the deed. It seems to be consistent with justice, that if the defendant makes a document a part of his answer, the plaintiff is entitled to know what that document is, because he has a right, at the hearing, to read such parts of the defendant's answer as he thinks fit. It is to be observed also, that if the plaintiff should think proper to amend his bill, and require the deed to be set forth at length, it would be a matter of course that the deed should be so set forth."

Effect of a Reference in the Answer.

In Sir James Wigram's treatise (l), an elaborate criticism upon his judgment may be found. He dissents from the conclusion to which the Lords Commissioners came, objecting to "the conclusive effect given to the reference in the answer, to the exclusion of those considerations which in other cases are of the essence of the question between the parties, namely, the nature of the document, and the case appearing upon the whole record."

In the case of *Adams v. Fisher* (m), Lord Cottenham took occasion to refer to the subject in the following terms:—"As to *Fardman v. Ellames*, it is not very pertinent to the present case. It was certainly no new decision, and I was very much surprised to hear any one treat it as such, and when I came to look into the doctrines laid down in the books, I felt no doubt upon the subject. Where a party has thought proper to put his defence upon a particular document, he himself having introduced it and put it forward, he cannot be permitted to make any representation of it however unfounded, which he pleases; but the plaintiff is entitled to see whether the defendant has rightly stated it. It is because the defendant chooses to make it part of his answer that the plaintiff is entitled to see it, not because the plaintiff has an interest in it. The principle is, that a defendant shall not avail himself of that mode of concealing his defence."

In the cases hitherto considered, the defendant seems to have simply stated the effect of certain deeds, and to have referred to them for greater certainty. If he should pray that the deeds referred to should be taken as part of his answer, the arguments against the production would no longer apply. Moreover, if the defendant, in addition to stating the effect of a document, should proceed partially to set it forth, the argument in favor of

When defendant partially sets out a document.

(l) "Points on the Law of Discovery," p. 302. (m) 3 M. & C. 548.

Effect of a Reference in the Answer.



Affidavit allowed to show that the required documents relate to defendant's title.

Exemption arising from professional privilege.

the production is rather stronger, although there seems to be no material difference in principle.

Lord Cottenham, in the case of *Latimer v. Neate* (*n*), urges upon the House of Lords as one of the grounds for confirming the judgment of the Court of Exchequer, "because the defendant having set out what he states as the contents of the deed (and most likely fairly,) the plaintiff under those circumstances is entitled to see whether the abstract be or not a correct abstract of those deeds of which he asks the production. I therefore suggest that the order of the Court below be affirmed." And in the case of *Phillips v. Evans* (*o*), the Vice-Chancellor Knight Bruce seems to rely partly upon the manner in which the document was set out.

It may here be observed, that in some cases, where the particular grounds of exemption upon which the defendant resists the production, are not sufficiently raised by the answer, a defendant has been permitted to file an affidavit for the purpose of bringing his case before the Court. This was permitted in the case of *Llewellyn v. Badeley* (*p*), for the purpose of establishing that the documents in question supported exclusively the defendant's case, and related to his defence of the suit. It seems, however, from the language of Sir James Wigram, V. C., upon that occasion, "that authority may be found for allowing an affidavit to be filed in opposition to a motion of this nature applicable to almost every ground which can successfully be urged against the production of such documents."

The next special exemption from discovery which may be urged by a defendant as an objection to a motion for the production of documents arises out of the privilege extended to professional communications (*1*). In a former part of this work (*q*), it has been found necessary to treat upon this subject with reference to the right of a defendant to demur to discovery sought from him, or to decline giving it by answer (*r*). There does not seem to be any difference as to the extent to which this privilege is conceded when the question arises upon motions for the production of documents, and when it arises upon exceptions to an answer, or upon a demurrer to a discovery. It will not, therefore, be necessary to repeat the principles before laid down, or refer again to the au-

(*n*) 11 Bligh, 149, and Wigram on Discovery, 352.  
(*o*) 2 Y. & C. 647.

(*p*) 1 Hare, 639.  
(*q*) Ante, p. 638.  
(*r*) Ante, p. 623.

(1) *Wright v. Mayer*, 6 Sumner's Vesey, 280 n. note (*a*), and cases cited; 1 Greenl. Ev. § 241.

rities; but in addition to the cases there quoted, it seems desirable to refer to the case of *Holmes v. Baddeley* (s), in which subject has again been brought before the attention of Lord Lyndhurst, and the result seems to be that letters written or cases referred for the opinion of counsel by a party or his solicitor, with a view to a suit then in contemplation, are privileged from production, not only in that suit but in any subsequent litigation with the parties respecting the same subject-matter, and involving the question to which such letters and cases relate. It may be mentioned also, that in cases where opinions of counsel have been taken by a trustee on behalf of a *cestui que trust*, and paid for out of the trust-fund, there is no doubt that the *cestui que trust* is entitled to call for their production; but opinions taken in the party's own behalf, and adversely to another, would be protected. In the case of *Woods v. Woods* (t), which was a suit by a *cestui que trust* to set aside a purchase of the trust property made many years before by the trustee, the trustee insisted on the knowledge of the transaction, and long acquiescence therein by the *cestui que trust*, and in his answer to a cross bill the *cestui que trust* admitted that he had an opinion of counsel on his right, which he had taken many years before. Sir James Wigram, V. C. held the opinion to be a privileged communication, and refused to order its production.

Privileged Documents.

Opinions taken by a trustee.

The case of *Steele v. Stewart* (u), which has recently occurred before Lord Lyndhurst, exhibits another instance of the application of the general rule concerning professional privilege. There was a great distance of the place where the evidence had to be collected, and the defendant's solicitor had to employ an agent. It was contended that communications between the defendant or his solicitor, and an unprofessional agent, were not protected, and that neither authority nor policy authorized the extension of the privilege to such a case. Both the V. C. of England, and Lord Lyndhurst, held that the letters in question were privileged, and Lord Lyndhurst said he did not consider this an extension of an admitted privilege. He considered the case as coming within the same principle on which the communication of the solicitor himself would, under similar circumstances, be privileged. There are certain other objections which a defendant is entitled to raise as a protection from discovery. Thus the plaintiff cannot compel the defendant to answer tending to involve him in a

Communications between a party and an unprofessional agent protected.

Other special objections protecting a defendant from disclosing documents.

) 1 Ph. 476.  
) 4 Hare, 83.

(u) 1 Ph. 471.

Special Ex-  
ceptions of the  
Defendant.

criminal charge (1). Neither can he succeed if the proposed discovery will subject the defendant to penalty or forfeiture. With respect to objections of this kind, the principles are precisely the same when the question arises upon a motion for the production of documents, as when it occurs upon a demurrer to the discovery or exception to an answer, so that it is now only necessary to refer the reader to the chapter where the subject has been before discussed (x).

Case of a mort-  
gagee.

An opinion seems to be generally prevalent that in the case of mortgagor and mortgagee, there is some difference in the manner in which the foregoing principles concerning the production of documents are applied. As it does not seem very clear what is the precise nature of the distinction, or indeed whether there is any difference further than what arises naturally from the particular circumstances of the case, it will be necessary shortly to call attention to the peculiarities resulting from the rights in Equity of a mortgagor and mortgagee in this respect, and the authorities upon the subject.

In a suit for  
redemption.

In an ordinary suit for redemption, where there is no dispute concerning the fact of the mortgage, the right of the plaintiff to come into Equity after the stipulated day for payment, is in consequence of the estate of the mortgagee being absolute at Law. Under such circumstances, the plaintiff relies for equitable relief, upon the fact that his legal estate is gone; if then the defendant does not dispute the plaintiff's equity, but only claims to hold the estate as a security for the debt, it seems reasonable that the Court should not, before the decree which ensures the defendant either his money or the estate, allow the plaintiff to inspect the mortgage deed. Otherwise the effect of such inspection might be to enable the plaintiff to detect flaws in the defendant's legal estate, and thus use the interference of a Court of Equity for the destruction of that legal estate, the assumed indefeasibility of which constituted his sole right to sue. Where, however, the defendant does not submit to be redeemed, but, denying that he is a mortgagee, claims to hold the estate free from any equity of redemption, it does not seem very clear what there is in the nature of the dispute between the parties to vary the ordinary rights of the plaintiff to a discovery of all that evidences his own case (y). It would seem strange

(x) Ante, p. 625-6, 823.

11 Bligh, 149; Wigram on Discovery

(y) See the case of *Latimer v. Neate*, 2 Y. & C. 262, Exch. Rep. & 287.

(1) *Rice v. Gordon*, 13 Sim. 580.

If the person in possession of the estate disavowing the character of mortgagee, and refusing to receive payment of the alleged mortgage, could at the same time assert the right of a mortgagee and claim to withhold production of the deed until payment had been made.

In the case of Mortgagee.

In the case of *Greenwood v. Rothwell* (z), the defendant denied the right of the plaintiffs to redeem, and Lord Langdale, M. R. refused to order production of the title-deeds. It was argued for the defendant that he was entitled to withhold the deeds by virtue of his title as mortgagee, until he had been fully paid. There is nothing in the judgment from which an inference can be drawn whether the production was refused upon the ground of the peculiar character of the mortgagee, or whether the Master of the Rolls refused it upon grounds applicable to all cases, namely, that the deeds in question related exclusively to the defendant's title.

In the case of *Phillips v. Evans* (a), a further charge made by indorsement, upon the mortgage deed, was impeached upon the ground that it was made when the mortgagee had notice of the insolvency of the mortgagor, and the bill charged that such notice would appear from recitals in the writing of further charge from the date thereof, and from the indorsements upon the original indenture. Upon a motion for the production of a mortgage deed, Sir J. L. Knight Bruce, V. C., said, "This is a bill filed to redeem a mortgage, and it is not disputed that the only question is what amount the plaintiff is to pay, which depends on the contents of the indorsement upon the mortgage deed, and the time when the indorsement was executed. The defendant sets out the instrument, which appears to be expressed in the first person, and to be contained in a few lines, which, he says, are the effect of that instrument, considering the manner in which the document is set out, the nature of the suit, and the circumstances relating to the insolvency of the mortgagor, including the date of the indorsement. I think that this<sup>d</sup> is a case in which the plaintiff should see the indorsement."

Where the only question is as to the amount.

The case of *Browne v. Lockhart* (b) was a foreclosure suit, so that the mortgagee occupied the position of plaintiff in the suit; no motion in the cause for the production of the mortgage deed was therefore made; but a question arose, with reference to the costs of the suit, as to the right of the person entitled to the equity of redemption, to call upon the mortgagee for its production. In

Right of the mortgagee to retain his deed before suit.

(z) 7 Beav. 291.  
(a) 2 Y. & C. 647.

(b) 10 Simons, 420.

Case of a Mortgagee.

commenting upon a case (c) where, after a decree *nisi* had been made, a mortgagee appears to have been ordered to produce his deed, in order that an assignment of the mortgage might be made, the V. C. of England said, "I apprehend that such an application would not be listened to at the present time. It does not quite tally with our notions of the right of the mortgagee to keep his deeds to himself until the moment arrives when the mortgagor appears with the principal and interest in his hands, and then the mortgagee is not bound to part with the deeds before he has received his money—at least, it must be a simultaneous transaction."

A motion for the production of documents must be made upon notice, and is subject to the ordinary rules affecting special motions (d). There does not seem to be any period of the cause after the filing of the answer, when such a motion cannot be made. Thus when the motion was made, after the witnesses had been examined, and the documents marked as exhibits, notwithstanding it was objected that the plaintiff, by inspecting them, would acquire the undue advantage of knowing what documents were intended to be produced on behalf of the defendant at the hearing, an order was made for their production (e). In the case of *Fen-*

## After publication.

*cott v. Clarke* (f) the V. C. of England is said to have hesitated at first about granting the motion as publication had passed; he, however, afterwards ordered the production. Moreover, it is competent to the plaintiff to move, although in the interval between the service of notice of motion, and the day when it is made, he has obtained an order to amend his bill (g); and although a motion for the production of documents is necessarily made upon the answer, yet it does not operate as an admission of the sufficiency of the answer, so that the plaintiff may, after such a motion, still file exceptions (h).

## Does not prevent exceptions to the answer.

## Form of the order.

The order usually directs the documents to be left with the Clerk of Records and Writs (i); and it would appear that the Court will never order production at any other place, except upon the consent of the person in whose possession they are (k). Upon the application, however, of the defendant, the Court will frequently order production at some other place for the sake of convenience. In such a case the order is drawn up in the following form: "Let the plaintiff, his solicitors, and agents, be at liberty

## In what place production ordered.

(c) *Anon. Moseley*, 246.(d) *Ante*, p. 1789.(e) *Duke of Beaufort v. Taylor*, 2 Hare, 245.

(f) 6 Sim. 8.

(g) 6 Beav. 264.

(h) *Lane v. Paul*, 3 Beav. 66.

(i) See post, 2067.

(k) *Maund v. Allies*, 4 M. & C. 503.

at all reasonable times, upon giving reasonable notice, to inspect and peruse at the office of Messrs. A. & B. the solicitors of the defendant C. D. at &c. the several deeds, &c. admitted by the answer of the said defendant to be in his possession, custody, or power (l), and take copies thereof, and abstracts and extracts therefrom, as they shall be advised at the plaintiff's expense, and let the said defendant produce the said deeds, &c. before the examiner, or at the execution of any commission for the examination of witnesses in this cause, and at the hearing of this cause, as the plaintiff shall require."

In what place  
Documents  
produced.

In the case of *Grane v. Cooper*, Lord Cottenham said, that "It was now a well established rule that if a defendant in his answer, after admitting the possession of books and papers relating to the matters in question, stated that those books and papers were in constant use in his business, and necessary for that purpose, the Court would, in the first instance, give credit to that statement, and order that they should be produced to plaintiffs at the place of business at which they were in use; and that if the plaintiff did not obtain a satisfactory inspection of them there, it was open to him to come to the Court for a further Order." Acting upon this principle, the Court will also order the production of them at the place of business of the defendant's solicitors; but as such an order is made for the defendant's convenience, the Court will not allow his solicitors to make any charge against the plaintiff for inspecting them (l). Nor are the solicitors entitled to insist upon making, and charging for, any copies that may be required of the deeds deposited with them, so that, according to Sir James Wigram, V. C., "so much difficulty might arise from making the order in that form, as to render it generally the better rule, that the order should be in the common form, namely, for the production of the documents at the office of the Court, in which case, any variation for the convenience of the parties, might be made a matter of arrangement between them." Lord Langdale, M. R., upon a motion for production in a supplemental suit, refused, notwithstanding the consent of the defendant, to order the required documents to be deposited in the Master's office, instead of with the Record and Writ Clerk, although other documents in the same matter had been there deposited under decree in the original suit (m).

At solicitor's  
place of busi-  
ness.

Costs in such  
a case.

(l) According to the notice of motion.

(l) *Woodroffe v. Daniel*, 10 Sim. 126.

(m) *Alcock v. Sloper*, 7 Beav. 48.



## Admission of Affidavits.

## Practice concerning affidavits.

It has before been necessary to refer to the practice of allowing an affidavit to be read upon a motion for the production of documents. A plaintiff is not entitled to file an affidavit to prove possession by the defendant, although he may verify by affidavit documents alleged in the bill, and neither admitted nor denied by the answer (*n*). On the other hand, where the answer taken by itself would have shown a sufficient admission of possession, the defendant has been permitted to show by affidavit that the documents in question are so circumstanced as not to be in his possession, custody, or power (*o*).

So also, the defendant is permitted to prove by affidavit that the required documents come within some of the special grounds of exemption; thus, notwithstanding there is no suggestion of it upon the answer, the defendant may show by affidavit that the required document is a privileged communication (*o*).

## Liberty to seal up irrelevant matter.

Moreover, where the defendant states that certain portions of the documents required to be produced do not relate to the matters in question, leave will be given him to conceal them; in such a case the order will be qualified in the following manner; "But the said defendant is to be at liberty to seal up such parts of the said books as, according to an affidavit to be previously made, do not relate to the matters in question in this cause" (1).

## When there is reason to suspect the defendant has concealed relevant matter.

In a case of this kind, even though there are strong grounds for suspecting that the defendant has sealed up matter that ought to have been disclosed, the Court is concluded by the oath of the defendant from giving further discovery (*p*). If, however, the defendant's affidavits contain statements at variance with each other, or if the document itself shows a discrepancy in his statements, it seems that it would be quite consistent with the rules of the Court to get at the truth by compelling the party to give discovery (*q*).

## How an order for production enforced.

When an order for the production of documents is made, it may be enforced in the usual manner (*r*), and it seems that if a cross bill be filed against the plaintiff, time will be given him to answer

(*n*) *Addis v. Campbell*, 1 Beav. 268.

(*o*) *Morrice v. Swaby*, 2 Beav. 500.

(*o*) *Tyler v. Drayton*, 2 Sim. & Stu. 309; *Hughes v. Biddulph*, 4 Russ. 190; *Parsons v. Robertson*, 2 Keen, 605; *Llewellyn v. Badeley*, 1 Hare, 527.

(*p*) *Sheffield Canal Company v. Sheffield and Rotherham Railway Company*, 1 P. 484.

(*q*) *Bowes v. Fernie*, 3 M. & C. 632.

(*r*) *Ante*, p. 1243-9.

(1) See *Dias v. Merle*, 2 Paige, 594.

until the order for the production of documents has been complied with (s).

Order how enforced.

When a person, not a party to the bill, has a deed in his possession which it is desirable should be produced before the examiner, he must be served with a *subpœna duces tecum*; and if he then neglects to produce it upon proof by affidavit that he has it, he may be put into contempt (t). This, however, is not the practice with respect to a defendant. In his case as we have seen, it must be shown that he has admitted himself to have it (u).

Against a person not a party to the cause.

When, however, a document has been produced by the defendant before a Commissioner, for the purpose of enabling the plaintiff to have it duly proved as an exhibit in the cause, then the defendant is bound to have it in Court at the hearing of the cause, although there has been no direct order against him for its production (x).

Document must be in Court at the hearing.

It need scarcely be mentioned, that the mere fact of a deed or other document being proved in the cause and referred to in the depositions, does not give to the other side any right to inspect it before the hearing (u), because, among other reasons, it is competent for the party who has proved it to use it or not at the hearing according to his discretion (x). But when the defendant's agent was subpoenaed by the plaintiff to produce at the hearing a parish book in his custody, the V. C. of England held, that the book being a public document, and appearing to come out of the custody of the defendant's agent, it was competent to the defendant as well as to the plaintiff to make use of it at the hearing (y).

The usual order when the defendant is required to deposit the documents with the Clerk of Records and Writs is in the following form —

Let the defendant, *A. B.*, on or before the      day of      (or within      days from the service of this order,) leave with the Clerk of Records and Writs, in whose division this cause is, the several deeds, &c., admitted by his answer, and the schedule hereto to be in his possession, custody, or power (z), with liberty for the plaintiff, his solicitors, or agents, to inspect and peruse the same, and take copies thereof, and abstracts and extracts therefrom, as they shall be advised, at the plaintiff's expense. And let the

Form of the order for production with Clerk of Record and Writs.

(s) *Holmes v. Baddeley*, 7 Beav. 39.

(u) *Davers v. Davers*, 2 P. Wms. 410; *Forester v. Helen*, 1 M'Clel. 558.

(t) Ante, p. 312. As to the lien of solicitor upon deeds in his possession, see post, Ch. xliii.

(z) *Wright v. Mayer*, 6 Ves. 281; *Wiley v. Pistor*, 7 Ves. 411.

(u) *Barnett v. Noble*, 1 Jac. & W. 27.

(y) *Ward v. Pomfret*, 5 Sim. 475.

(x) *Wheat v. Graham*, 7 Sim. 61.

(z) According to the notice of motion.

Order how  
enforced.

said Clerk of Records and Writs produce the said deeds, &c., before the examiner, or at the execution of any commission for the examination of witnesses in this cause, and at the hearing of this cause, as the plaintiff shall require.

Effect of the  
order.

The effect of an order against the defendant for the production of documents is only to give the plaintiff the power of inspecting and taking copies of them. It does not make the documents evidence in the cause, unless the mere circumstance of their coming out of the custody of the defendant would, in itself, render them admissible evidence. If, therefore, the plaintiff wishes to have them proved in the cause, or to have them produced at the hearing, it is necessary that the concluding part of the above form of order should be inserted. The order for production, in itself establishes that the documents came out of the defendant's custody into the hands of the officer of the Court, so that it is not necessary for the purpose of proving this fact to read any portion of the answer (a).

With whom  
documents  
deposited.

Till very recently documents when produced were ordinarily deposited with the Clerk in Court of the defendant to whom they belonged, and when it was necessary to have them brought into Court at the hearing, taken down to the assizes, or produced before a commissioner, it was the practice for the particular Clerk in Court with whom they were deposited, or some person authorized by him, to attend with them upon payment of his fees and expenses (b). But now documents are deposited with the Clerk of Records and Writs (b), who is the general officer of the Court, and in no respect the agent of one party to the cause more than another.

Notice of  
motion.

The notice of motion ought to state that application will be made for the Record and Writ Clerk to produce the required documents before an examiner or upon a commission. Otherwise, unless the party affected by the motion appears, or otherwise consents, it seems that the order would be confined to a direction that the documents be deposited with the Clerk of Records and Writs. The order does not, unless specially applied for, extend to direct the Clerk of Records and Writs to attend with them at the trial of any action or issue depending between the parties, consequently a further order from the Court is necessary where the parties omit to make application for such a direction.

(a) *Taylor v. Salmon*, 3 M. & C. 283.  
422.

(b) *Harris v. Bodenham*, 1 S. & S.

(b) 3rd Order, October, 1842.

SECTION II.

*Of Production by the Plaintiff.*

IN all the cases hitherto considered, the motion has been assumed to be on the part of the plaintiff for the purpose of obtaining an order for a production of documents admitted by a defendant to be in his possession. It is now intended to consider the cases when the defendant may, before the hearing of a cause, obtain an inspection of documents in the possession of the plaintiff. As a general rule, when discovery from the plaintiff, either concerning matters of fact, or the contents of documents, is necessary to a defendant for the purpose of enabling him to complete his defence to the case sought to be established against him, he can only obtain such discovery by means of a cross bill (1). Upon such a bill being filed, the plaintiff in the original suit, in his character of a defendant to the cross bill, becomes liable to the application of the same rules concerning the production of documents, as a defendant in any other case. Consequently it will not be necessary to pursue the subject further in this direction. It may, however, be observed, that an answer to a cross bill cannot in general be obtained until the original bill has been fully answered; and, not only must a full answer in the ordinary sense of the term be placed upon the record before an answer to the cross bill can be enforced, but the plaintiff in the original suit will be allowed time to answer the cross bill until after the defendant has complied with an order for production of deeds made in the original suit (c).

Production upon the Trial of an Action Issue.

General rule

Answering a cross bill.

The cases in which a defendant, either before or after answer, has been allowed to dispense with the necessity of filing a cross bill, constitute exceptions to the general rule above stated, and are not very numerous.

It appears generally to have been the practice in framing bills, for the plaintiff to say that he had left the instruments in the hands of his Clerk in Court, in order that the defendant might inspect them, and to pray that after inspection, the defendant might answer the interrogatories applied to the subject. This practice

Former practice.

(c) *Holmes v. Baddeley*, 7 Beav. 69.

(c) *Princess of Wales v. Earl of Liverpool*, 1 Sw. 123.

(1) Where the books or documents of the plaintiff are material for the defendant's defence of the suit, the defendant must file a cross-bill against the plaintiff for a discovery of them. *Kelly v. Eckford*, 5 Paige, 548.

When ordered. has, however, long been discontinued, and it may, in consequence, have become necessary, under particular circumstances, for a defendant to be allowed to move that the plaintiff may produce documents in his possession (1). The argument in favor of this practice is chiefly deduced from the rule at Law. There it seems that when the plaintiff founds his claim upon an instrument under seal, he must, in technical language, make *profert*, and the defendant may claim *oyer*, the result of which is, that the defendant has the benefit of inspecting the instrument before he determines upon his defence. So, also, in actions upon written instruments, not under seal, as bills of exchange, and policies of insurance, although the form of pleading is different, and the plaintiff does not make *profert*, the defendant is, in fact, entitled to obtain, by motion, a copy of the instrument forming the subject of the action.

Lord Eldon considered the principle upon which Courts of Law proceed, in compelling on motion the production of bills of exchange or promissory notes, objectionable, inasmuch as it is founded upon a supposition that they are doing what Courts of Equity do. Whereas "there is a mighty difference between simply producing an instrument, and producing it in answer to a bill of discovery, where the defendant has an opportunity of accompanying the production with a statement of every thing which is necessary to protect him from its consequences" (d). This observation, however, does not apply to a production by the plaintiff, where no cross bill of discovery or otherwise has been filed by the defendant.

When ordered. In Wyatt's Practical Register (e), it is said, that where a deed in the plaintiff's possession mentioned in the bill, is necessary to the defendant's making his defence a full answer, the Court has ordered the plaintiff to give him a copy of it — but no authority is referred to for the dictum.

In the case of an heir at law. In a case, before Lord Hardwicke, L. C., where the heir at law, by his answer to a bill, brought to establish a will, admitted it to be duly executed, although a motion by him for an inspection of the title-deeds and writings belonging to the estate, was reheard, yet his Lordship seemed to think that, under some particular cir-

(d) Ibid. 120.

(e) P. 161.

(1) In ordinary cases the plaintiff cannot be compelled, upon motion, to submit his books or other documentary evidence in his possession to the inspection of the defendant, to enable the latter to answer the bill and make his defence in the suit. But if the plaintiff, on request, refuses to permit the defendant to inspect such books or documents, he cannot afterwards object that the answer is insufficient in not stating their contents. *Kelly v. Eckford*, 5 Paige, 548. See *Jenning v. Smith*, 3 John. Ch. 409.

cumstances, he might have been entitled to what he prayed, "as, <sup>When ordered</sup> suppose he should, in his answer, insist upon some old entail, which has not been barred by a recovery, and consequently still existing, or controvert the legality of the will, or the execution of it, or insist that only a part of the real estate is devised away, and of course the remainder descends, and he expressly claims it as heir at law" (d).

In a case before the Court of Exchequer, in 1724, where a bill was brought by the Corporation of the City of London, for duties on exportation, claimed by prescription, the Court, on motion, ordered that the defendant might have inspection of the city books, and by-laws relating to the duty in question, and recognized the practice of making similar orders between lords of manors and their tenants, as the principle upon which the order in question was made (e). <sup>Production of city books and by-laws. In cases between lords of manors and tenants,</sup>

But, in an anonymous case (f), where the defendant by an executor moved that the plaintiff might pay money into Court, Lord Thurlow is reported to have said, — "Did you ever know an instance of a defendant's applying against a plaintiff? There cannot be any, it hath been denied. If you want it, you must file a cross bill for the purpose." <sup>For payment of money into Court by an executor plaintiff.</sup>

In a suit by the executor of a deceased partner against the survivor, for an account, a motion was made by the defendant, before Lord Eldon, for production of the accounts before answer, and was refused; his Lordship, however, observed that he thought he remembered this kind of motion, by the defendant stating by his answer, that the bill called for a discovery, which he could not make completely without seeing the partnership books and accounts, and that he verily believed those books and accounts, to the joint possession of which both were entitled, were in the hands of the plaintiff; that the Court would stay proceedings against him, for not putting in his answer until he had been assisted with that inspection, and that such a motion would do without a cross bill (g) (1). <sup>Partnership accounts. When plaintiff and defendant jointly interested in the documents.</sup>

(d) *Potter v. Potter*, 3 Atk. 719.

(f) 2 Dick. 778.

(e) *City of London v. Thomson*, 3 Swanst. 265.

(g) *Pickering v. Rigby*, 18 Ves. 484.

(1) In cases of Partnership, where the partnership books and papers are in the hands of one of the copartners, or of his assignees, or representatives, upon the application of the other party, in any stage of the suit, the party so having them in his possession, or under his control, will be compelled to deposit them in the hands of an officer of the Court, for the inspection of the party making such application, and that such party may take copies thereof, if necessary. *Kelly v. Eckford*, 5 Paige, 348.

When ordered.

In another case, also before Lord Eldon, on a bill to set aside a partition on the ground of inequality, and for a new partition stating a recent valuation and estimate, the gross result of which, only omitting the particulars, was contained in a schedule to the bill, the answer denying the accuracy of the valuation, but alleging that the defendant was unable to set forth in what particulars it was inaccurate by reason of such omission; a motion, by the defendant, for the production of the valuation and papers, &c. relative thereto, was refused with costs. But it was observed, by his Lordship, that there the production could not be obtained even if a cross bill were filed, and he took the distinction that, in *Pickering v. Rigby* (*k*), the plaintiff and defendant were jointly entitled to the possession of the documents of which production was required (*k*).

Right of defendant to have proceedings stayed until production.

But in the celebrated case of *Princess of Wales v. The Earl of Liverpool* (*l*), the question was fully considered, and the right of the defendant, in that case, to have an inspection of documents, where necessary to his defence, or at least to have proceedings stayed until after an inspection should have been allowed, was, after much discussion, established. In that case, the plaintiff, in a bill against executors, stated that two promissory notes of the same date, one for 15,000*l* sterling, the other for 15,000*l* French louis, were given by the testator for securing a sum of 15,000*l*. On an affidavit by one of the executors, that he had inspected the first note and observed on the face of it circumstances tending to impeach its authenticity; that he was informed and believed that the second note had been produced by the plaintiff for payment in a foreign country, and that he was advised and believed it was necessary, in order that his answer might fully meet the case, that he should, before answer, have inspection of the second note; it was ordered that the defendants should not be compelled to answer till a fortnight after production of the second note (*m*).

From this case it appears that the motion must be supported by affidavit stating the necessity for inspection, and in some measure the grounds on which the necessity arises.

Where no allegation of the document being in the possession of the plaintiff.

It is to be observed, that the bill contained no allegation of the document in question being in the possession of the plaintiff, and a question was raised, whether, if a plaintiff not stating that certain written instruments are in his custody, yet founds a claim thereon,

(*k*) *Ubi supra*.

(*l*) 1 Swanst. 114.

(*k*) *Micklethwait v. Moore*, 3 Mer. 292.

(*m*) *Ibid.* 126.

the Court will not infer that he has possession of them, unless an affidavit be made to the contrary (n). When ordered

But in a case where the plaintiff having mentioned and referred to certain drafts or sketches of accounts in his bill, did not allege nor was it shown that they were in his possession, the Court refused a motion for the production of them with costs (o).

In the case of *Jones v. Lewis* (p), Sir John Leach, V. C., held, that where it is plainly necessary that the plaintiff should produce an instrument stated in his bill, to enable a defendant to make a full defence, the Court will give time to answer until after such instrument is produced; where, therefore, by affidavit, the defendant alleged that he believed the agreement on which the bill was founded was a forgery, and that he could not fully answer before he had inspected it, production was ordered (1). The order in *Jones v. Lewis* was appealed against before Lord Eldon and discharged (q), but it does not appear whether upon the ground of the insufficiency in the affidavit concerning the alleged forgery, or upon the ground of his Lordship dissenting from the principle as stated by Sir J. Leach. Where the defendant alleged forgery.

In the case of *Penfold v. Nunn* (r), the V. C. of England refused a motion by a defendant to compel the plaintiff to produce documents, although the defendant by his affidavit swore that he believed the documents in question were in the plaintiff's possession, and that he could not put in his answer without an inspection of them: upon that occasion his Honor declared, that "He never understood the reasoning on which the decision in *The Princess of Wales v. Lord Liverpool* proceeded, and could not accede to it." A similar motion was refused in the case of *Milligan v. Mitchell* (s), and his Honor again intimated, that "He did not think that he was bound to follow the decision in *The Princess of Wales v. Lord Liverpool*, except in a case precisely similar to it." In a case (t), however, before Lord Langdale, M. R., where the plaintiff offered to produce a document in his possession, and required the defendant to inspect it, an order was made that the defendant should have a month's time to answer from the period of the plaintiff producing the required document. When refused.

(n) Ibid. 122. (s) 6 Sim. 186; and see *Spragg v. Corner*, 2 Cox, 109; and *Maund v. Allies*, 4 M. & C. 503.  
(o) *Jackson v. Sedgwick*, 2 Wils. 167. (t) *Stephen v. Morris*, 1 Beav. 175.  
(p) 2 S. & S. 242.  
(q) 4 Sim. 324.  
(r) 5 Sim. 410.

(1) See *Comstock v. Apthorpe*, 8 Cowen, 386.



Order for Preliminary Inquiries.

Documents belonging to a person other than the plaintiff ordered to be produced.

Documents not belonging to the plaintiff, but alleged to have been lent to him by a person not a party to the suit, have been ordered to be produced by a plaintiff. Thus in a suit for titles in the Exchequer, the plaintiff was ordered to produce documents in his possession, the property of the vicar, though he was not a party, they being required for the purposes of the examination of the vicar, from whom the plaintiff had obtained them (*u*).

Order for preliminary inquiries.

Before leaving this part of the work, it is convenient to mention another interlocutory application before decree, of not unfrequent occurrence, namely, that by which an order for preliminary inquiries is obtained. The 5th Order of May, 1839, directs, "That in all cases in which it shall appear that certain preliminary accounts and inquiries must be taken and made, before the rights and interests of the parties to the cause can be ascertained, or the question therein arising can be determined; the plaintiff shall be at liberty at any time after the defendant shall have appeared to the bill to move the Court on notice, that such inquiries and accounts shall be made and taken; and that an order referring it to the Master to make such inquiries, and take such accounts, shall thereupon be made without prejudice to any question in the cause, if it shall appear to the Court that the same will be beneficial to such (if any) parties to the cause as may not be competent to consent thereto; and that the same is consented to by such (if any) of the defendants as being competent to consent have not put in their answer to the bill; and that the same is consented to by, or is proper to be made upon the statements contained in the answer of such (if any) of the defendants as have answered the bill."

When it may be obtained.

This order can be obtained even after the cause is set down for hearing, if the case is in other respects suitable (*a*), but it will be refused when the title of the plaintiff to sue is not admitted by the answer (*b*), or where granting the motion would involve a decision upon some of the points in the Court (*c*). It seems, moreover, that an order cannot be obtained, where some of the defendants are out of the jurisdiction (*d*).

- (*u*) *Foreman v. Cooper*, 11 Pri. 245; *Kinshela v. Lee*, 7 Beav. 300. 515.  
 (*a*) *Strother v. Dutton*, 10 Sim. 288.  
 (*b*) *Topham v. Lightbody*, 1 Hare, 289; *Wilson v. Appelgarth*, 10 Sim. 657; *Belcher v. Whitmore*, 7 Beav. 245; *Kinshela v. Lee*, 7 Beav. 300.  
 (*c*) *Curd v. Curd*, 2 Hare, 116; *Breeze v. English*, *ibid.* 118; *Frost v. Hamilton*, 4 Beav. 33; *Lee v. Shaw*, 10 Sim. 369.  
 (*d*) *Barrett v. Buck*, 2 Hare, 530; *Meinertzen v. Davis*, 10 Sim. 239.

An order of this kind obtained in an administration suit, does not contain a direction for the payment of the debts of the testator; and therefore has not the same effect as a decree in entitling the executors to restrain a creditor suing them at Law (e). But the cause may be brought on for hearing, and a decree obtained before the Master has made his report, or a direction may be inserted in the order excluding the creditors who do not come in under the benefit of the order; and then payment of the debts may be at once directed by the original decree (f).

Order for Preliminary Inquiries.

Effect of order in an administration suit.

A decree for account gives as we have seen (g) an interest in the suit for many purposes to a defendant, and an order for preliminary accounts has so far the same effect, as that upon the death of a sole plaintiff a defendant has been allowed to file a supplemental bill (h).

The Master's report should be confirmed by orders *nisi* and absolute. It is read on the hearing of the cause as evidence, and entered in the decree accordingly (i).

e) *Teague v. Richards*, 11 Sim.

(g) *Upjohn v. Upjohn*, 4 Beav. 246.

f) *Troller v. Walmsley*, 7 Beav.

(h) Ante, p. 1349.

i.

(i) *Beck v. Burn*, Rolls, Hil. Term, 1843.

## CHAPTER XLII.

PETITIONS FOR THE APPOINTMENT OF GUARDIANS AND  
ORDER OF MAINTENANCE.SECT. I.—*Appointment of Guardians.*

In general no  
remedy with-  
out suit.

As a general rule, none of the powers or remedies appertaining to the original jurisdiction of the Court of Chancery can be called into operation until a bill has been regularly filed and a suit duly instituted. In all the former parts of this work, the practice has been stated with reference to this general rule, and no mention has been made of any other method of originating proceedings in Chancery. Exceptions, however, to this rule, occur in many instances where special powers have been conferred upon the Court by Act of Parliament, as the statutes usually direct the jurisdiction they create shall be exercised in a summary manner upon petition. Cases of this kind will be subsequently considered. But there is one instance of a portion of the original jurisdiction of Chancery being exercised upon petition without suit, and the practice relative thereto it is desirable in the first instance to investigate. This exception to the general rule occurs where a guardian to the person, or estate of an infant is appointed, or an order for maintenance out of his property is made in a summary manner upon petition. The power of appointing guardians and making orders for maintenance, constitutes a part of that general and important jurisdiction which the Court of Chancery exerts for the protection of the property of infants and the safe custody of their persons during their minorities (a).

Exception to  
the general  
rule in case of  
infants.

When suit ne-  
cessary.

When it is desirable that the estate of the infant should be managed by the Court, or that special directions should be given concerning his education, maintenance, or custody, a suit must be regularly instituted; in which case, immediately upon the bill being filed, the infant becomes a ward of Court, and thereupon any

(a) For the origin and history of this jurisdiction see Co. Litt. 89, a., note 16; 2 Fonb. Tr. Eq. note, p. 226. The Duke of Beaufort, 2 Russ. 30; [2 Story Eq. Jur. § 1327, et seq.; 2 Kent, (5th ed.) 219, et seq. Lect. 30.] 5th Edit. F. N. B. 232; Wellesley v.

erson wrongfully interfering either with his property or person, may be punished as guilty of a contempt of Court (b). General Jurisdiction.

In order that the benefit arising from the protection of the Court, may be extended to all cases in which interference is desirable, it is permitted to any person to commence proceedings on behalf of infants, subject, however, to the risk of incurring the censure of the Court, and of being compelled to pay the costs of the suit in the event of its subsequently appearing that the proceedings were improperly instituted (c).

So far as the jurisdiction of the Court relates to the appointment of guardians and the protection of the persons of infants, it does not seem absolutely necessary to allege as a foundation for the interference of the Court, that the infant is possessed of property; but, with the exception of appointing a guardian for the purpose of consenting to a marriage, there can scarcely occur a case where the Court can be called upon to interfere unless the infant is possessed of some property. According to Lord Eldon in *Wellesley v. The Duke of Beaufort* (d), "The Court is not in the habit of exercising jurisdiction over the persons of infants except in cases where the existence of property has brought them within the power of the Court, but it is not from any want of jurisdiction, that it does not act, but from a want of means to exercise its jurisdiction, because the Court cannot take upon itself the maintenance of all the children in the kingdom. It can exercise this jurisdiction usefully and practically only where it has the means of doing so, that is to say, by its having the means of applying property for the use and maintenance of the infants."

Whether the infant must have property in order that the Court may have jurisdiction.

The cases, however, in which an infant and his property are placed under the protection of the Court in the course of a suit regularly instituted, present no peculiarities to require a detailed explanation in this place; but a summary jurisdiction has arisen under which the Courts of Equity are enabled to afford to infants and their property a certain limited amount of protection upon petition without suit, and it is to this summary jurisdiction, and to the procedure connected with it, that the present chapter will be devoted.

The exercise of this summary jurisdiction on the part of the Court is limited to the grant of two different kinds of relief:— Summary jurisdiction.

(b) *Butler v. Freeman*, Amb. 302, note (2); 2 Story Eq. Jur. § 1353.]  
[Blunt's ed.] and notes there quoted; (c) *Starten v. Bartholomew*, 6 Beav. 143; *Sale v. Sale*, 1 Beav. 586; see also the case of *Hughes v. Science*, Macpherson on Infants, p. 581; *Fox v. Sowerkrop*, 1 Beav. 583.  
[S. C. cited in Blunt's Amb. 302, (d) 2 Russ. 20.]

When appointed without suit.

Objects of it.

*Petitions for Appointment of Guardians and Order of Maintenance.*

First, The appointment of some person to have the custody of the person and estate of an infant, and the care of his education during minority.

Secondly, The grant of some provision for the maintenance of an infant out of his property when no sufficient fund is otherwise available for that purpose.

It is usual for both of these forms of relief to be granted upon one petition, but it will be more convenient first to consider the circumstances under which an order for the appointment of a guardian alone may be obtained.

It is stated that the earliest case upon record of the exercise by the Court of Chancery of this power of appointing a guardian upon petition without suit, "occurred in the year 1696, in the case of Hampden (*d*)."<sup>(d)</sup> It appears, however, upon reference to the Registrar's books that cases of a similar kind occurred at an earlier period (*e*).

When the father is alive.

Where the only object of the petition is the appointment of the guardian of the person, there does not seem to be any limit to the jurisdiction of the Court arising from the size of the estate of the infant. In such a case, however large the property may be, the proper course seems to be to present a petition, and there is no necessity for filing a bill (*f*). The fact of a father of an infant being alive, is not in itself a sufficient reason to prevent the Court interfering, but if a sufficiently strong case is made, a person will be appointed, upon petition, without suit, to act as guardian during the lifetime of the father. In *ex parte Mountfort*, Lord Eldon said, "I have no doubt, that in certain cases the Court will, upon petition, without a bill appoint, not a guardian, which cannot be during the father's life, but a person to act as guardian, though in modern times the Court has professed to be very cautious upon that (*g*) (1)."

(*d*) Co. Litt. 89, a., n. 16.

(*e*) Ex relatione, Mr. Monro.

(*f*) Ex parte Mountfort, 15 Ves. 447, n.

(*g*) The case of Wellesley v. The

Duke of Beaufort, 2 Russ. 1, was upon a petition in a cause, but may be referred to for the principles upon which the Court appoints a guardian during the lifetime of the father.

(1) Whenever a father is guilty of gross ill-treatment or cruelty towards his infant children; or is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or he professes atheistical or irreligious principles; or his domestic associations are such, as tend to the corruption and contamination of his children; or he otherwise acts in a manner injurious to the morals or interests of his children; in every such case the Court of Chancery will interfere and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education. 2 Story Eq. Jur. § 1341; *Powel v. Cleaver*,

by statute 12 Car. II. c. 24, it was enacted, "That where any son hath or shall have any child or children under the age of twenty-one years, and not married at the time of his death, it shall and may be lawful to and for the father of such child, whether born at the time of the decease of the father, or at that time *en ventre sa mere*, or whether such father be within the age of twenty-one years, or of full age, by deed executed in his life-time, or by his last will and testament in writing, in the presence of two or more credible witnesses, in such manner and from time to time as he shall respectively think fit, to dispose of the custody and tuition of such child or children, for and during such time as he or they shall respectively remain under the age of twenty-one years, or any lesser time, to any person or persons in possession or remainder other than Popish Recusants, and that his disposition of the custody of such child or children made on or after the 24th day of February, 1645, or hereafter to be made, shall be good and effectual against all and every person or persons claiming the custody or tuition of such child or children as guardian in *socage* or otherwise; and that such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised as aforesaid, shall and may maintain an action of ravishment of ward or trespass against any person or persons which shall wrongfully take away or detain such child or children, and shall and may recover damages for the same in the said action for the use and benefit of such child or children. And that such person or persons to whom the custody of such child or children hath been or shall be so disposed or devised, shall and may take into his or their custody, to the use of such child or children, the profits of all lands, tenements, and hereditaments of such child or children, and also the custody, tuition, and management of the goods, chattels, and personal estate of such child or children, till their respective age of twenty-one years or any lesser time, according to such disposition as aforesaid, and may bring such action or actions in relation thereunto by law a guardian in common *socage* might do."

Testamentary  
Guardian.

Of the testa-  
mentary guar-  
dians by  
statute (1).

10. C. C. (Perkins's ed.) 500, 501, and notes and cases cited; 1 Macdonald on Infants, (Lond. ed. 1841,) 142, 147. The English cases on this subject are numerous. See some of them cited 2 Story Eq. Jur. § 1341 in note; *Manneville v. De Manneville*, 10 Sumner's Vesey, 52, and notes. See *ex parte* Wollstonecraft, 4 John. Ch. 80; *ex parte* Waldron, 13 John. Ch. 10; *People v. Mercien*, 8 Paige, 47; *U. States v. Green*, 3 Mason, 482; *re Mitchell*, R. M. Charl. 489, 494, 495; 2 Kent, (5th ed.) 194, 195, in note; *Ahrenfeldt v. Ahrenfeldt*, 1 Hoff. Ch. R. 497.  
(1) See Rev. Stat. Mass. ch. 79, § 6, § 7; 2 Kent, (5th ed.) 224, 225, and note; *Peyton v. Smith*, 2 Dev. & Bat. Eq. 325; *M'Alister v. Olmstead*, 10 Mich. 210.

Testamentary  
Guardian.

It will be observed, that the effect of this statute was to enable any father, although within the age of twenty-one years, to dispose of the custody of any child that he might leave unmarried, and this power he might have exercised either by deed or will.

Effect of testa-  
mentary guar-  
dianship.

The seventh section of the recent Wills Act, 7 W. IV. & 1 Vic. c. 26, has enacted, "That no will made by any person under the age of twenty-one years shall be valid." So that the power conferred by stat. 12 Car. II. c. 24, by which a father, under the age of twenty-one years, could have devised the custody of his children, is now abolished. There does not, however, seem any reason why the power to dispose of the custody *by deed* should not still continue in a like case. The Act only enables the father to dispose of the custody of his unmarried children, but it seems that if a male child be unmarried at the time of the death of his father, the testamentary guardianship does not determine until he attains the age of twenty-one years notwithstanding his marriage (*h*). In such a case, the guardianship of a female would necessarily determine by marriage (*i*).

Court may ap-  
point another  
guardian.

The Act confers authority upon no person except a father, and with respect to a father, it has reference only to legitimate children. A testamentary guardian is subject to the control of the Court (*k*) both with respect to the property and the person of the infant; and even during his lifetime, the Court has power to appoint another guardian in his stead. But, according to Lord Redesdale, in the case of *O'Keefe v. Carey* (*m*), "Where a testamentary guardian has once taken the trust upon him and acted as guardian, if it is sought to remove him for misconduct, a bill must be filed; but not when he declined to act; for that is as if there had been no appointment of him as guardian." In such cases, a guardian should be appointed upon petition, and it may here be observed, that the mere circumstance of a dispute concerning the person to be appointed guardian is no reason why the application should not be made upon petition without suit (*n*), "although it is a reason why no order should be made upon the petition without a reference to the Master (*o*)."

Appointment  
not in general  
without refer-  
ence.

As a general rule, the Court will not, upon the petition being presented, make an order for the appointment of a guardian with-

(*h*) Earl of Shaftesbury's case, cited 3 Atk. 625.

(*i*) *Mendes v. Mendes*, 1 Ves. 91.

(*k*) *Duke of Beaufort v. Berty*, 1 P. W. 705; *Foster v. Denny*, 2 Ch. Ca. 237; *Morgan v. Dillon*, 9 Mod. 141.

(*m*) 1 Sch. & Lef. 106.

(*n*) *Eyre v. Countess of Shaftesbury*, 2 P. W. 123; *ex parte Earl of Ilchester*, 7 Ves. 348.

(*o*) *Beattie v. Johnstone*, 1 Ph. 30, affirmed on appeal by the House of Lords.

out a reference to the Master; but in some cases, where there is no doubt who ought to be appointed, the Court takes upon itself to dispense with the reference, and itself nominates a guardian; thus where a reputed father has, by will, appointed a guardian to an illegitimate child, which, as we have seen, is inoperative under the statute, if no objection is made, the Court will act upon such a nomination without a reference, and thereby carry into effect that which the father intended; but which he could not, under the provisions of the Act, strictly by law accomplish (*p*). So, also, it appears that occasionally the Court has at once appointed a guardian upon the nomination of the infant appearing himself in Court for the purpose (*q*). A reference has also in many cases been dispensed with, solely in consequence of the small amount of the property of the infant, thus where it consisted of a pension of 15*l.* a year during minority (*r*). Sir William Grant, however, M. R. refused to make the order without a reference, when the property amounted to 1500*l.* (*s*). And Sir T. Plumer, M. R., in like manner refused, when the property consisted of a rent charge of 150*l.* a year (*t*). On the other hand, the present V. C. of England has made such an order without reference when the property consisted of a freehold estate of the annual value of 80*l.* (*u*).

Testamentary  
Guardian.

In what cases  
reference dis-  
pensed with.

In most cases, however, the order made on the hearing of the petition directs a reference to the Master to approve of a proper person to be appointed guardian, and to inquire and state the petitioner's age, and the nature and amount of his fortune, and what relations he has, and on what evidence or ground he approves of such person so to be appointed guardian (*x*) (1). The report made by the Master upon this reference, cannot be excepted to, nor is it confirmed by orders *nisi* and absolute; but as soon as it is filed, a petition may be presented for its confirmation, and for an order of the Court for the appointment of the person approved of as guardian. If any of the persons interested in the matter wish to object to the appointment, or to any part of the report, they must present a special petition, stating the reasons of their opposition, and praying a reference to the Master to review his report (*y*).

(*p*) *Chatteris v. Young*, 1 J. & W. 106, and cases there referred to; and see *Beattie v. Johnstone*, 1 Ph. 30.  
(*q*) In *Re Man*, Seton on Decrees, 233; ex parte *Edwards*, 3 At. 519.  
(*r*) In *Re Jones*, 1 Russ. 478.  
(*s*) Ex parte *Wheeler*, 16 Ves. 266.  
(*t*) Ex parte *Janion*, 1 Jac. & W. 395.  
(*u*) Ex parte *Jackson*, 6 Sim. 212.  
(*x*) For form of the order see Seton upon Decrees, 277.  
(*y*) See ante, p. 1492.

(1) See 2 Kent, (5th ed.) 227.



Reference to  
the Master.

Guardianship,  
how deter-  
mined.

No survivor-  
ship.

*Secus*, in case  
of testamen-  
tary guardians.

Power of guar-  
dian over the  
estate.

If the mother of the infant, or any other female, be appointed guardian, and marry after her appointment, her guardianship determines, and it is, of course, to make a new reference to the Master, to approve of a guardian in her place (z). So, also, where one of several guardians appointed by the Court dies, the right of the survivors determines, and it becomes necessary to apply again to the Court, by petition, to make a new appointment. If, however, no objection appears, it is usual to appoint the survivors without a reference (a). In the case, however, of testamentary guardians, it does not appear that the office is terminated upon the death of one; but even though there be no words of survivorship in the deed or will, appointing the guardian, the office will, upon the death of one, extend to the survivors (b).

The appointment of a guardian by the Court seems to confer upon the person appointed exclusive right to the custody of the person of the infant.

There is, however, some difficulty in determining with precision the extent of the power over the estate exercised by a guardian appointed by the Court. In the case of *ex parte Starkie* (c), the V. C. of England is reported to have used the expression, "The order discharged the party making the payment, to the extent only of the allowance made." In the case before him, the infant was entitled to rents of freehold estate, and it has been inferred from this expression, that a guardian cannot give a valid receipt to a tenant unless there is an order for maintenance to the full extent of the infant's fortune. Cases have therefore occurred where it has been deemed necessary that a bill should be filed, and a receiver appointed when the estate of the infant was larger than the amount to be applied in his maintenance. The language, however, of the orders appointing guardians, both in ancient and in modern times, seems to show that the power over the estate is more extensive than what could be inferred from this case. Moreover, it is the custom to make the guardian enter into recogni-

(z) *In Re Gornall*, 1 Beav. 347.

(a) *Hall v. Jones*, 2 Sim. 41.

(b) *P. Wms.* 107, 108, 133.

(c) 3 Sim. 339. On referring to the original petition in this case, and the order entered, *Reg. Lib.* 1829, B. f. 590, it appears that the infant's estate was vested in trustees, who had no power to advance maintenance. It is not unreasonable, therefore, to suppose that the observation of the Vice-Chancellor had reference only to a

case like that before him, where trustees in possession of the estate make payments to a guardian of the person. It is obvious that in such a case the trustees would only be discharged to the extent of the allowance made for maintenance. It does not, however, follow that a guardian of the estate, where there is no trustee, cannot give a receipt for the full amount of the infant's fortune.

ances to account for what he receives of the estate, which would be unnecessary if the appointment gave him no control over the property of the infant. The following is an ordinary form of order made on the appointment of a guardian of the person and estate.

Power of  
Guardian over  
the Estate.

Upon A. B. in the petition named, entering into recognizance to be approved of by the Master of the Court in rotation, and taken before a Master extraordinary in the country, if there shall be occasion, duly to account for what he shall receive of the said C. D., the infant's fortune, let the said A. B. be appointed guardian of the person and estate of the said C. D., the infant, during his minority, or until the further order of the Court."

Form of order  
upon petition  
without suit.

When a specific sum is directed to be applied for maintenance, the order goes on to direct that the guardian shall be at liberty to apply such amount for the maintenance of the infant (*d*); but the form of the order, when there is no direction for maintenance, shows more clearly the power over the estate incident to the office of guardian.

In a case before Sir John Leach, M. R., on an application being made for a guardian of the person and estate where the infant's freehold property was of the value of 350*l.* a year, the objection was taken that it ought to be by bill, and the registrar, Mr Colville, called the attention of His Honor to the terms of the order, as affecting the estate. The Master of the Rolls, after consideration and referring to the bar, made the order of reference as asked; and an order was subsequently made confirming the report, and appointing the guardian on his giving security: no specific allowance for maintenance, however, was made (*e*).

The power of the testamentary guardian over the property of the infant, is more clearly defined; he derives his authority from the Act of Parliament, and thereby has control as well over the lands descended to the infant from his father, as also over all other the real and personal estate belonging to the infant. The statute, moreover, expressly authorizes him to bring all such actions in relation thereto, as by law, a guardian in common socage, might do (1). The testamentary guardian seems to possess as an inci-

(*d*) Vice Chancellor of England, 14th January, 1842.

(*e*) In re Tugwell, order of reference 8th of March, 1833, Reg. Lib. 1833, B. f. 1056; report confirmed, L. C. 6th May, 1833, Reg. Lib. 1833, B. f. 1529. In the following cases

similar orders were made:—ex parte Twemlow, 25th Feb. 1801; *Keys v. Cornwall*, 13th Nov. 1799; ex parte Cope, 6th August, 1802; ex parte Lloyd, 17th June, 1800; ex relatione Mr. Colville.

(1) There were common law rights belonging to the guardian in socage, and they apply to the general guardian at the present day. 2 Kent (5th ed.) 226; *Byrne v. Van Hoesen*, 5 John. 66.

Power of  
Testamentary  
Guardians.

dent to his office the power of making valid leases of the estate of the infant for the term of his guardianship, upon which ejectment can be maintained; but a lease made by such a guardian to last beyond the minority of the ward is absolutely void after the infant comes of age (*g*) (1).

Subject to the  
control of the  
Court.

Although, however, the testamentary guardian possesses these legal rights over the estate of the infant, he is, in all respects, subject to the control of the Court, and liable to account for what he receives (2). His rights and liabilities seem to be nearly the same as those of the guardian in *socage*, except that they continue until the infant is twenty-one, instead of terminating, as in the case of the guardian in *socage*, at fourteen (3). According to Lord Hardwicke, "It is at the peril of a guardian in *socage*, what he applies for maintenance, and he will be allowed according to the discretion he has used" (*h*).

No power of  
leasing in  
guardian ap-  
pointed by the  
Court.

From what has been stated concerning the power of a guardian appointed by the Court, over the estate, it may be inferred, that he has no power incident to his office of making a lease valid at Law of any portion of the infant's estate; nor is there any authority as to the circumstances under which a lease made by such a guardian during the minority would be supported in equity. Consequently, when a suit is instituted, it is usual for a Receiver to be appointed, in which case the estate is managed according to the practice, as before stated (*i*). The Court, however, cannot, un-

(*g*) *Roe dem. Parry v. Hodgson*, 2 Wils. 135.

(*h*) *Ex parte Whitfield*, 2 Atk. 315.

(*i*) *Ante*, p. 1969.

(1) The guardian of the estate has no further power over, or concern with, the real estate than that which relates to the leasing of it, and the reception of the rents and profits, and it is his duty to place the ward's land upon lease. 2 Kent, (5th ed.) 228; *Genet v. Tallmadge*, 1 John. Ch. 561; *Jones v. Ward*, 10 Yerger, 160.

He may lease during the minority of the ward and no longer. *Field v. Schieffelin*, 7 John. Ch. 154; *Snook v. Sutton*, 5 Halsted, 133; *Putnam v. Ritchie*, 6 Paige, 391.

He may sell the personal estate without the previous order of the Court. *Field v. Schieffelin*, 7 John. Ch. 150; *Ellis v. Essex M. Bridge*, 2 Pick. 243; *Bank of Virginia v. Craig*, 6 Leigh, 390.

(2) See 2 Kent, (5th ed.) 227, and note; in the *Matter of Andrews*, 1 John. Ch. 99; *ex parte Crumb*, 2 John. Ch. 439; 2 Story Eq. Jur. § 1344; *Rev. Stat. Mass. ch. 79, § 7*; 1 Smith Ch. Pr. (2nd Am. ed.) 653, note (*e*).

(3) It is remarked by Chancellor Kent, 2 Kent Comm. (5th ed.) 226, "the distinction of guardians by nature and by *socage*, seems now to be lost or gone into oblivion, and those several kinds of guardians have become essentially superseded in practice by the *Chancery Guardians*, or guardians appointed by the Court of Chancery, or by the *Surrogates* in the respective counties of New York, and by Courts of a similar character, and having jurisdiction of testamentary matters, in the other States of the Union. Testamentary guardians are not very common, and all other guardians are now appointed by the one or the other of those jurisdictions." See *Putnam v. Ritchie*, 6 Paige, 390.

der its original jurisdiction, in such a case enable a Receiver to create any legal term in the land, nor could it in any manner insure the occupation of the tenant beyond the period of the infant's minority. For the purpose, therefore, both of preventing the necessity of instituting a suit wherever a lease even for a short duration of an infant's estate was necessary, and also for the purpose of enabling the Court to make valid leases to last beyond the period of the minority of the infant, it has been enacted by statute 1 W. IV. c. 65, s. 17, "That where any person being an infant under the age of 21 years, is, or shall be seised or possessed of or entitled to any land in fee or in tail, or to any leasehold land for an absolute interest, and it shall appear to the Court of Chancery to be for the benefit of such person, that a lease or underlease should be made of such estates for terms of years, for encouraging the erection of buildings thereon, or for repairing buildings actually being thereon, or the working of mines or otherwise improving the same, or for farming, or other purposes, it shall be lawful for such infant, or his guardian in the name of such infant, by the direction of the Court of Chancery, to be signified by an order to be made in a summary way upon the petition of such infant or his guardian, to make such lease of the lands of such person respectively, or any part thereof according to his or her interest therein respectively, and to the nature of the tenure of such estates respectively, for such term or terms of years and subject to such rents and covenants as the said Court of Chancery shall direct, but in no such case shall any fine or premium be taken, and in every such case the best rent that can be obtained, regard being had to the nature of the lease, shall be reserved upon such lease, and the leases, and covenants, and provisions therein, shall be settled and approved of by the Master of the said Court, and a counterpart of every such lease shall be executed by the lessee or lessees therein to be named, and such counterparts shall be deposited for safe custody in the Master's office until such infant shall attain the age of twenty-one, but with liberty to proper parties to have the use thereof, if required in the mean time, for the purpose of enforcing any of the covenants therein contained, provided that no lease be made of the capital mansion house, and the park and grounds re-

Power of the Court to Lease

Statutes.  
Power of Court to make leases for infants.

Upon petition in a summary manner.

Proceedings  
upon the  
Petition.

Surrender of  
leases.

Proceedings  
upon the peti-  
tion.

Guardian to  
consent to  
marriage.

spectively held therewith for any period exceeding the minority of such infant" (k).

The 12th section of the same Act confers a similar jurisdiction upon the Court to make order in a summary way upon the petition of the guardians, for the surrender of leases belonging to the infants (1), and for the acceptance in place thereof of renewed leases.

It has been before stated, that it is usual upon the presentation of a petition for the appointment of a guardian of the person and estate for the Court to refer it to the Master, "to approve of a proper person or persons to be appointed guardian or guardians of the person and estates of the said A. B., the infant; and to inquire and state to the Court the age of the said infant, and what relations he has, and the nature and amount of his fortune, and to state on what evidence or grounds he approves of any particular person or persons to be such guardian or guardians. And whether the person or persons he shall approve of to be such guardian or guardians, will be willing to give security duly to account for what he shall receive and pay of the said infant's fortune."

When this order, which may be varied according to any special circumstances in the case, has been drawn up, a state of facts duly verified, setting forth the particulars necessary as a foundation for the report, and concluding with a proposal for the required appointment, is carried into the Master's office. The parties then attend before the Master, who makes his report accordingly, and the subsequent proceedings are as before stated (l).

In general, in order to give the Court jurisdiction, it is necessary that a petition presented for the appointment of a guardian should allege that the infant has some property or estate to be protected (m); but to this rule there is an exception in the case of a petition under the provisions of the marriage Act, 4 Geo. IV. c. 76, which enables a guardian to be appointed to give consent to the marriage of an infant. By the 16th section of this statute, it is enacted, "That the father, if living, of any party under twenty-one years of age, such party not being a widower or widow; or

(k) Cases under this section occurred in *Harris v. Davis*, Jurist, 9 vol. 1084; in *re Griffin*, V. C. of England, 28th April, 1843, and 17th Feb. 1844; in *re Aldridge*, M. R. 13th Novr. 1835; S. C. 12th Feb. 1836; *Milward v. Milward*, 1st March, 1836, and S. C. 24th May, 1836; *Hill v.*

*Hill*, 24th June, 1836; *Frank v. Frank*, 11th May, 1836; *ex parte Earl of Darnley*, 23rd March, 1836; *ex parte Brystock*, 11th May, 1837; *Cook v. Cook*, 9th June, 1840.

(l) Ante, p. 2082.

(m) See supra, p. 2079.

(1) See *Putnam v. Ritchie*, 6 Paige, 391.

father shall be dead, the guardian or guardians of the party under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then the mother of such party, if unmarried, and if there shall be no mother unmarried, then the guardian or guardians of the person appointed by the Court of Chancery, (if any,) or one of them, shall have authority to give consent to the marriage of such party; and such consent is hereby required for the marriage of such party so under age, unless there shall be no person authorized to give such consent.

Guardian to  
consent to  
Marriage.

For the purposes of giving consent under this Act, guardians are appointed upon petition without suit, and without a reference to the Master (n).

Under the 17th section of the same Act, it is enacted, that in case either father or fathers of the parties to be married, or of one of them, under age, as aforesaid, shall be *non compos mentis*, or the guardian or guardians, mother or mothers, or any of them whose consent is made necessary as aforesaid, to the marriage of such party or parties, shall be *non compos mentis*, or in parts beyond the seas, or all unreasonably, or from undue motives, refuse or withhold their, or their consent, to a proper marriage, then it shall and lawfully be lawful for any person desirous of marrying, in any of the above-mentioned cases, to apply by petition to the Lord Chancellor or Lord Keeper, or the Lords Commissioners of the Great Seal of Great Britain for the time being, Master of the Rolls, or the Lord Chancellor of England, who is and are respectively hereby empowered to proceed upon such petition in a summary way; and in the marriage proposed shall, upon examination, appear to be proper, the said Lord Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal for the time being, Master of the Rolls, or Vice-Chancellor, shall judicially declare the same to be valid, and such judicial declaration shall be deemed and taken to be valid and effectual to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage.

On the words of this section, Lord Cottenham decided (o), that there is no jurisdiction in the Court to sanction a marriage of a minor, if the father, not being of unsound mind, unreasonably or without due motives, withholds his consent. In a recent case (p),

Ex parte Becher, 1 Bro. C. C. 1. 213.  
In the matter of Woollcombe,

(o) Ex parte I. C. 3 M. C. 471.  
(p) Ex parte Reilly, Jurist, 7 vol. 589.

Guardian to  
consent to  
Marriage.

Lord Lyndhurst made the declaration required by this section, without a reference to the Master (*q*).

## SECTION II.

### *Orders for Maintenance upon Petition without Suit.*

Powers for  
maintenance  
usual in settle-  
ments.

FOR the purpose of providing for the maintenance of infants out of their property during minority, it is customary to insert in settlements, express powers, authorizing the legal holders of the funds to apply either the whole or some portion of the income or capital for the maintenance and advancement of the infant, according to such conditions as may be considered convenient. In the absence of any such powers, in the event of the father being dead, or unable to support the infant, the guardian may apply the income of the infant's estate towards his maintenance; and such payments (if clearly necessary) would be allowed the guardian in passing his accounts.

Necessity of  
applying to  
the Court for  
maintenance.

But in such a case, the trustee or guardian acts upon his own responsibility, and it is therefore usual, when there is a necessity for an application of a portion of the infant's property towards his support, and no power to authorize it, for the Court upon the petition of the infant to make an order for his maintenance (1).

Practice of  
ordering main-  
tenance with-  
out suit.

The practice of ordering maintenance upon petition, without suit, is more recent than that of so ordering the appointment of a guardian. According to Lord Hardwicke, Sir Joseph Jekyll was the first judge who went so far in this summary way to direct an allowance for maintenance; before his time, the Court would do no more than appoint a guardian in *socage*, till the infant had attained his age of fourteen (*r*).

The practice, however, though now completely established, has always been considered to be confined to cases where the income of the infant was small (2). In other cases it has been deemed

(*q*) The following cases have occurred under this Act, *ex parte* Wheeler, M. R. 15th July, 1834, Reg. Lib. B. 1833, f. 1091; *ex parte* Cooper, V. C. 19th August, 1834, Reg. Lib. A. 1833, f. 1266; *ex parte* Rawson, V. C. of England, 12th Jan. 1844; Attorney-general v. Water, M. R. 23rd Dec. 1835; Attorney-general v. Severne, V. C. Knight Bruce, 10th June. 1845, Reg. Lib. A. 1844, f. 1709; 9 Jurist, 575.

(*r*) *Ex parte* Ricards, 3 Atk. 519.

(1) See 2 Story Eq. Jur. § 1354, § 1354 a.

(2) 2 Story Eq. Jur. § 1354.

necessary that a bill should be filed. No clear rule as to the amount which renders a bill necessary, can be laid down; but the more recent cases show a relaxation in the practice, and a tendency to abolish any distinction that has existed between the cases where the income of the infant has been derived from real estate, and where it has been derived from personalty.

Where Property of small amount.

Whether the practice is confined to cases where property is of small amount.

In *ex parte Lakin* (g), Sir John Leach said that there should be some precise limit as to such applications, and that he could find none, and that unless the rule was otherwise fixed by the Lord Chancellor, he should entertain such petitions where the income did not exceed 300*l.* a year. Lord Eldon, in the case of *ex parte Mountfort* (r), said, that in applications for maintenance, he took the course to be not to do it upon petition, except in very special cases, as where there is a specific fund for maintenance, or the property is very small, but that as a general rule, if the infant had 100*l.* per annum, a bill should be filed. Lord Gifford said that he had conferred with the Lord Chancellor upon the subject, and the result of that communication authorized him in saying, that according to the law of the Court, maintenance would not be allowed, without a bill filed, to an infant entitled to real estate, except in cases where the property was very small, and that where the estate was of more value than 100*l.* a year, he would not, upon petition, make an order of reference to approve of a proper maintenance, but would put the parties to file a bill (s). In a recent case, however, where the income of an infant was derived from personal estate, and exceeded 1500*l.* a year, the Vice-Chancellor of England said that he thought the distinction as to making orders on petitions, without suit, between cases where the income was above or below 300*l.* per annum, was without any foundation in principle, and he made the order (t). So, also, in a case where the income of the infant was derived from the rents of a freehold estate of the value of 260*l.* per annum, the same judge said that Lord Eldon had, during the latter part of his judicial life, refused to make an order for a reference as to maintenance out of an infant's freehold estate, without suit, but that he could never discover the reason for such refusal, as the order discharged the party making the payment to the extent only of the allowance made, and

(g) 4 Russ. 307.  
(r) 15 Vesey, 448.

(s) In re Molesworth, cited 4 Russell, 308.  
(t) In re Christie, 9 Sim. 643.



to refer it to the Master, to inquire if the parents were of ability to maintain the children; if not, then to report what would be proper maintenance, and this practice does not vary where maintenance is given directly by the will, unless in cases where it is given to the father, under which circumstances, it is a legacy to him.

Proceedings upon Petition.

The same ground of exception is again stated by Lord Thurlow in *Andrews v. Partington* (x), "If the will had given the dividend to the father for the maintenance of the children, it would have amounted to a legacy of the dividends to the father, which he would have been entitled to, though he had not spent half of it on the children's maintenance." This distinction was acted upon by the V. C. of England in *Hawkins v. Watts* (y), where a testator gave a share of his personal estate to his son-in-law, in trust, to apply the same for the maintenance of his children by the testator's daughter, and it was held that the son-in-law was entitled to apply the interest of the share for his children's maintenance, notwithstanding he might be of ability to maintain them.

Except where given to the father expressly for maintenance.

Another exception to the general rule, rendering it incumbent upon a father to maintain his children exclusively out of his own property, occurs where the father has entered into a contract, part of the consideration for which is, that certain property should be applied to the support of his children; thus, in *Meacher v. Young* (a), a proviso that the issue of the marriage should have maintenance out of the trust fund, formed an integral part of the contract, and even one of the considerations which had moved the husband to join as a party in the settlement. Under these circumstances, Sir J. Leach, M. R. held that he had a right to have the contract strictly executed in his own favor, without reference to the question of ability.

Except also where maintenance is consideration of a contract by the father.

It may be here mentioned, that when the infant and his father were resident abroad, the Court made an order enabling the father to appoint an attorney to receive the sum allowed for maintenance upon the production to the Accountant-general of an affidavit that he had duly applied in the maintenance and education of the infant all monies received by him on that account (b).

Usually, when a petition praying for maintenance is presented,

(x) 2 Cox, 224.

(y) 7 Sim. 199.

(a) 2 M. & K. 490; *Stocken v.*

*Stocken*, 4 M. & C. 95; *Mundy v.*

*Earl Howe*, 4 Bro. C. C. 224.

(b) *De Weever v. Rochport*, 6 Beav. 391, and cases there quoted.

Proceedings  
upon Petition.

a reference is made to the Master to inquire and state what will be proper to be allowed for the maintenance and education of the petitioner during minority, and from what past period such allowance should commence, and out of what fund it should be taken. The guardian will usually be allowed any costs he may have incurred as between solicitor and client; but any sums which he has expended, and which would not be allowed under that head, should be mentioned in the petition, in which case, if necessary, a special direction will be given in the order concerning them (c). It seems that if any other persons are interested in the fund, out of which maintenance is sought, or if there is any doubt concerning the right of the infant to have it allotted to him, a bill must be filed (d); but in *ex parte* Keble (e), a case where it was doubtful whether the Court could give maintenance, Lord Eldon, although he ultimately refused to make the order upon the merits, yet made no objection to the point being raised upon petition without suit.

Maintenance  
out of capital  
without refer-  
ence.

In some cases, where the property of the infant has been very small, maintenance has been ordered out of the principal of the fund upon petition, without suit, without a reference to the Master, as where the whole property of two infants consisted of copyhold premises, yielding about 6*l.* per annum, and a sum of 258*l.* (f).

In cases where stock is standing, not in the names of trustees for the benefit of the infant, but in the name of the infant himself, a statutory jurisdiction has been conferred upon the Court for the purposes of enabling orders to be made directing the payment of the dividends.

Power of  
Court to order  
dividends to be  
paid to guar-  
dian.

By stat. 1 W. IV. c. 65, sec. 32, "The Court of Chancery may, by an order to be made on the petition of the guardian of an infant in whose name any stock shall be standing, or any sum of money, by virtue of any Act for paying off any stock, and who shall be beneficially entitled thereto; or if there shall be no guardian, by an order to be made in any cause, depending in the said Court, direct all or any part of the dividends due, or to become due in respect of such stocks or any such sum of money, to be paid to any guardian of such infant, or to any other person ac-

(c) For cases concerning maintenance for time past, see *ex parte* Bond, 2 M. & K. 439; *Bruin v. Knott*, 12 Sim. 458; *Stephens v. Lawry*, 2 Y. & C. 87.


(d) *Fairman v. Green*, 10 Ves. 47.

(e) 11 Ves. 606.

(f) *Ex parte* Green, 1 Jac. & W. 253. See also *ex parte* Chamber, 1 R. & M. 577. *Ex parte* Swift, 1 R. & M. 575.

ording to the discretion of such Court for the maintenance and education, or otherwise, for the benefit of such infant, such guardian or other person to whom such payment shall be directed to be made, being named in the order, directing such payment, and the receipt of such guardian or other person for such dividends or sum of money, or any part thereof shall be as effectual as if such infant had attained the age of twenty-one years, and had signed and given the same."

Power to order  
Payment of  
Dividends.



## CHAPTER XLIII.

## THE STATUTORY JURISDICTION OF THE COURT.

SECTION I. — *Introduction.*

THIS work has been hitherto devoted to an investigation of that part of the practice which relates to the original jurisdiction of the Court of Chancery. This practice is, as we have seen, founded partly upon immemorial customs in the offices connected with the Court, partly upon the decisions of the Judges and the General Orders, and partly upon direct provisions made by Acts of Parliament. In many instances, where the legislature has thus conferred upon the Court additional means of enforcing its decrees and orders, the powers given for this object have been interwoven with the original practice; such statutes have consequently been already stated (*a*), and need not be made the subject of further discussion. There are also other Acts of Parliament affecting in various ways the rights of property, and therefore incidentally controlling and modifying the jurisdiction in Chancery, but although the construction of these acts has frequently to be determined in equity, they relate rather to the law than the practice of the Court, and, therefore, they do not come within the object of this work.

Difference between statutory and original jurisdiction. Subject to these exceptions, it is intended in this chapter to review the Acts conferring additional powers upon the Court, and to state whatever peculiarities there may be in the manner in which this statutory jurisdiction is carried into effect. In the first place, there is this material distinction between the manner in which the powers and remedies incident to the original jurisdiction are called into operation, and the means by which orders under statutes are made, namely, that in the former case it is, as we have seen, absolutely necessary, in almost all cases, that a bill should be filed and a suit regularly instituted before any relief can be obtained,

(*a*) Ante, pp. 581, 1236, 1913.

whereas in the latter case, it is usual for the Act of Parliament providing the additional remedy also to enact that it may be obtained in a summary manner upon petition. In all such cases, the petition should be entitled in the Act under which it is presented (b); it should also be entitled in the matter of the particular person or estate to which it has reference (c). The omission of this latter heading or title is often productive of great inconvenience and delay both to the parties and to the officers of the Court, as it renders it extremely difficult to distinguish at any future period one petition from another that has been presented under the same Act.

Proceeding by  
Petition.

If, as is usually the case, the Act enables the Lord Chancellor and the Master of the Rolls to make orders under it, the petition may be addressed to either of them; but if addressed to the Lord Chancellor, it may be heard by any one of the Vice-Chancellors (d).

The Act itself frequently states precisely the order which the petitioner is ultimately entitled to receive upon the presentation of his petition. In such cases, the Court will not deviate from the letter of the Act, nor make any order partly founded upon its original jurisdiction, and partly founded upon the statute. It will, however, in many cases for its own satisfaction, though not directed so to do by the Act, first make a reference to the Master to ascertain whether the circumstances to which the Act applies occur in the case of the petitioners. It is usual for the statute to direct that the matter may be heard upon affidavits, in which case not only can the Court act upon such evidence, but the Master to whom the reference is made ought also to proceed upon affidavit (e).

## SECTION II.

### *Statutes relating to Charities.*

WE have before had occasion to state the manner in which it is now usual for the Attorney-general to exhibit informations on behalf of individuals who are considered to be under the General jurisdiction concerning charities.

(b) *Ex parte* Law, 4 Beav. 510.

(c) Where the jurisdiction is conferred by the statute, and the property sought to be affected forms the subject-matter of a suit, the petition should be entitled both in the cause and under the Act.

(d) *Ex parte* Taylor, 10 Sim. 291.

[See also 16th Order of May, 1837, and 6th of 11th November, 1841.]

(e) *Ex parte* Greenhouse, 1 Sw. 60.

protection of the crown as *parens patrie* in relation to general charities, idiots, and lunatics (f). It is clear what portion of this jurisdiction of the Court was assumed previous to the statute 43r. The portion of it arose from the power of the Sovereign to institute proceedings by means of the Attorney-General of charities, and what portion of it is in the jurisdiction of the Court to enforce trusts.

The Statute 43 Eliz. c. 4 (1), commencing "Charitable Uses," recites that "lands, tenements, profits, hereditaments, goods, chattels, and money, have been heretofore given, devised, assigned, as well by the Queen's most excellent most noble progenitors, as well by sundry other persons, some for the relief of aged, impotent, and sick persons, some for maintenance of sick and maimed persons, some for schools of learning, free schools, and some for the repair of bridges, ports, havens, sea banks, and highways; some for education of orphans; some for or towards relief, support, houses of correction; some for marriage, for supportation, aid, and help of young men, and persons decayed; and others for redemption of prisoners or captives; and for aid or ease of the poor, concerning payments of fifteens, setting of taxes, which lands, tenements, rents, and profits, and goods, chattels, money, and stock have not been employed according to the intent of the givers and founders thereof by reason of default and negligence in those that should pay, the same."

'This statute has in almost all respects the same meaning as the words in the recital just quoted are still in

Jur. Vo

(g) Upon this subject see Story, et seq.]

(1) The St. 43 Eliz. c. 4, relating to charital principle and substance, a part of the law of Mery, 16 Pick. 107.

So in North Carolina, Kentucky and Penns-  
1 Hawks, 96; Gass v. Wilhite, 2 Dana, 170;  
R. 88.

This statute is not in force in Virginia or in N. Genl., 5 Harr. & John. 392; Gallego v. Atty.-Asso. v. Hart, 4 Wheat. 1; 1 Jarman, Wills, (

Court, in determining what gifts come within its present charitable jurisdiction, has adopted the practice of being guided by this statute, and no bequests are deemed within the authority of Chancery, and capable of being established and regulated thereby, except bequests for those purposes which that statute enumerates as charitable, or which by analogy are deemed within its spirit and intendment (*d*) (1).

St. 12 Geo.  
III. c. 101.

It does not appear that there is any instance in which the Court has acted on this statute since the case of *ex parte* Kirkby Ravensworth Hospital (*e*), and it therefore may now be considered practically obsolete, it will be sufficient here to state generally its effect. The Court was by it enabled to issue commissions to certain persons of whom the bishop of the diocese was one, authorising them by summoning juries and otherwise, to inquire concerning abuses in charities of the above description. The commissioners had power to make orders, provided they were not repugnant to the statutes or decrees of the founders, which were to stand good and be executed until undone or altered by the Lord Chancellor; an appeal was given to any person aggrieved by such orders to the Lord Chancellor (*f*).

Effect of the  
statute.

Commissions for charitable uses fell into disuse, partly by their abuse, partly because they were found insufficient in prosecuting the claim in many instances, and also from being extremely unjust in many instances as to the persons called upon to account for property, or the persons sought to be charged thereby (*g*). When the custom of issuing commissions concerning charities ceased, the only manner by which any remedy could be obtained in Chancery for their abuse was by way of information. Under these circumstances, the statute 52 Geo. III. c. 101, frequently called Sir Samuel Romilly's Act, was passed, which recites, "That it is expedient to provide a more summary remedy in cases of breaches of trust created for charitable purposes, as well as for the just and upright administration of the same." By the 1st section, it is enacted, that from and after the passing of the Act in every case of a breach of any trust or supposed breach of any trust

Cause of its  
disuse.

Recital.

1st. section.  
In what cases  
it applies.

(*d*) *Kendall v. Granger*, 5 Beav. 300; *Attorney-general v. Corporation of Shrewsbury*, 6 Beav. 220; *Attorney-general v. Compton*, 1 Y. & C. 417.

(*e*) 15 Ves. 305.

(*f*) For a detailed account of the

effect of this statute, and the decisions under it, vide *Duke's Law of Charitable Uses*, and *Shelford on Mortmain*, p. 276.

(*g*) *Lord Redesdale in Corp. of Ludlow v. Greenhouse*, 1 Bligh, N. S. 62.

(1) See 2 Story Eq. Jur. § 1155, § 1158, § 1160; 2 Kent, (5th ed.) 287, 288; 1 Jarman on Wills, (1st Am. ed.) 197, note (1).

Enables Court  
to make orders  
upon petition.

created for charitable purposes, or where a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, or for any two or more persons to present a petition to the Chancellor, Lord Keeper, or Lords Commissioners of the Great Seal, or Master of the Rolls, or the Court of Exchequer, stating such cause, and requiring relief as the nature of the case may require, and for the Lord Chancellor, Lord Keeper, or Master of the Rolls, or the Court of Exchequer, to take into consideration the custody of the Great Seal, and for the Lord Chancellor, Lord Keeper, or Master of the Rolls, or the Court of Exchequer, and they are to make such order upon such petition in a summary way, and upon such evidence as shall be produced upon such petition, and to make such order therein, and to pay the costs of such applications as to him or them shall seem just, and such order shall be final and conclusive, and no appeal shall be taken therefrom by any person who shall think himself or themselves aggrieved, within two years from the time when such order shall be made, passed and entered by the proper officer, or from such decisions to the House of Lords, and the King is enacted and declared that an appeal shall not be taken from any such order, or from such decisions to the House of Lords.

## Time for appeal.

Signature by  
Petitioners.

The second section directs that every as aforesaid shall be signed by the person the presence of, and shall be attested by concerned for such petitioners, and even submitted to, and be allowed by His Majesty's solicitor-general, and such allowance shall any such petition shall be presented.

**Signature of  
Attorney or  
Solicitor-  
General.**

**To what cases  
the Act  
applies.**

From the general language of the Act it applied to every case where a breach committed, or the administration of the fund, the interference of the Court. The however, has not been by any means so: of the Act itself are not sufficient to exp is held to apply, reference must be had t decided upon it for the purpose of unde recognised construction. In *ex parte F* that the Court, though it has jurisdiction cases whether it is fit to exercise that party to file an information. In that ca tion was to obtain the restitution of land



belonged to the charity, so that there was an adverse claim set upon the part of the charity to another person's estate; and, under these circumstances, Lord Eldon refused to make any order upon the petition.

In *ex parte* Brown, in the matter of Sir John Norris's Charity (*f*), a similar question arose, and Lord Eldon discharged an order that had been made upon petition, stating, that in his opinion constructive trusts were not within the meaning of the Act.

In the case of *The Corporation of Ludlow v. Greenhouse and others* (*g*), the construction to be put upon the Act was brought before the House of Lords, and elaborate judgments were delivered both by Lord Redesdale and Lord Eldon. In that case, an ancient chapel had, in the year 1590, together with certain other messuages, been devised upon trusts for the building of almshouses, the support of poor people, and for keeping up the chapel. In 1769, the chapel, the almshouses, and the messuages, had been conveyed by the heir of the surviving trustee to the Corporation of Ludlow, who had pulled down the chapel, converted the materials to other purposes, and granted leases of the ground on which it stood and adjoining thereto. The general object of the petition was to have a scheme for the future regulation of the charity, and to obtain a restitution of the property with consequential directions. The case came on first before Sir Thomas Plumer (*h*), when no objection seems to have been made to the jurisdiction, and he made an order, the effect of which was, a declaration that the Corporation had been guilty of a breach of trust, discharging them from being trustees, and referring it to the Master to appoint new trustees in their place, to whom they were to convey the estate at their own expense; he also directed an inquiry concerning the value of the chapel and its materials at the time when it was pulled down, and as to what would be the expense of restoring the chapel and burying ground (*i*). It was this order against which the appeal to the House of Lords took place. The judgments of Lord Eldon and Lord Redesdale upon the occasion are so long to be quoted: they seem to proceed upon the principle that the Act did not apply to a case of a complicated description, involving the rights of parties either not before the Court at all, or only in the character of respondents to the petition, who, therefore, had not had an opportunity of putting upon the record a for-

To what Cases the Act applies.

Does not apply where there is an adverse claim to charity property. Nor where constructive trusts.

(*f*) Cooper, 295; see also *ex parte* Kinner and others in the matter of the Lawford Charities, 2 Mer. 458. (*h*) 1 Mad. 92. (*i*) For the Form of the Order, see 1 Bligh, N. S. 39. (*g*) 1 Bligh, N. S. 17.

To what  
Cases the Act  
applies.

Does not  
apply when a  
dispute con-  
cerning the  
objects of this  
Charity.

Or when it is  
doubtful in  
whom the  
legal estate is  
vested.

Charity  
estates order-  
ed to be sold  
on petition.

When petition  
relates to a  
Grammar  
School.

mal answer to the case made against them. They agreed that the order made by Sir Thomas Plumer was such as ought only to have been made upon information, and accordingly his judgment was reversed.

In Dean Clarke's Charity (*k*), the trustees presented the petition, and one object of it was to obtain the decision of the Court, which of two parties was entitled to have the benefit of the charity; the V. C. of England dismissed the petition, holding, upon the authority of *The Corporation of Ludlow v. Greenhouse*, that where two individuals are claiming the trust property, adversely to each other, the right cannot be decided on petition.

In Phillipot's Charity (*l*) the V. C. of England dismissed the petition with costs to be paid by the petitioners, upon the ground that although the object of the petition was a scheme for the management of the property, it appeared that there was a dispute as to the persons in whom the legal estate was vested, and, consequently, it was clearly not a case that ought to be decided upon petition. The V. C. of England, also, in the case of *The Reading Dispensary (m)*, decided that the Court, upon petition, had no jurisdiction to make an order transferring the funds of a Dispensary to a Hospital, and amalgamating the two institutions. When, however, the point to be decided is simply a question of law depending upon the construction of a particular instrument, there is reason for

supposing a decision may be obtained by petition (*n*). In the case of *Parke's Charity (o)*, where it appeared that it would be for the benefit of the charity, that part of the estates belonging to it should be sold, an order for that purpose was made upon petition. It may be convenient here to mention that where, upon a petition, presented under the Act, an order had been made, appointing new trustees, the V. C. of England directed that, in the deed appointing the new trustees, provision should be made for the appointment of new trustees in future (*p*).

Where the object of the petition has been the internal regulation of a school or charity, no doubt in general has existed concerning the right to apply under the statute (*q*). If, however, there is a visitor, and the matter concerning which the interference of the Court is sought belongs exclusively to his cognizance, then the complaint must be addressed to him. In such a case,

(*k*) 8 Sim. 34.

(*l*) 8 Sim. 381. See also in re *West Retford Church Lands*, 10 Sim. 101.

(*m*) 10 Sim. 118.

(*n*) In re *Upton Warren*, 1 M. & K. 410.

(*o*) 12 Sim. 329.

(*p*) 12 Sim. 262. See post, p. 2115, as to power in Court of appointing new trustees of charity.

(*q*) In re *Rugby School*, 1 Nev. 457.

her by petition under the Act, nor by information, can a remedy be obtained in Chancery (*g*).

To what Cases the Act applies.

The st. 3 & 4 Vic. c. 77, intituled "An Act for improving the litigation, and extending the benefits of Grammar Schools," has, in the case of Endowed Grammar Schools, enabled the Court of Chancery to exert a more extensive jurisdiction with respect to the system of education, the right of admission, the appointment of schoolmasters and other matters. It expressly provides by the

Powers given to Courts of Equity by st. 3 & 4 Vict. c. 77, may be exercised on petition.

section, "That all applications may be heard and determined, all powers given by this Act to the Court of Chancery, may be exercised in cases brought before such Court by petition only, and all petitions to be presented, heard, and determined, according to the provisions of the stat. 52nd Geo. III. c. 101."

The form of order under this Act for extending the system of litigation was framed by the V. C. of England in the case of The City of Ravensworth Grammar School (*r*). The application will, however, be refused unless the funds are more than sufficient for the express object of the application (*s*).

We have seen that the stat. 52nd Geo. III. c. 101, renders it necessary that the Attorney or Solicitor-general should signify his assent or approbation of the petition, by affixing his signature

Signature of the Attorney-general.

. The Solicitor-general, however, can only act during the vacancy of the office of Attorney-general; according to Lord Eldon (*t*), a petition can derive no sanction from the signature of the Solicitor-general, he being competent to act as and in the place of the Attorney-general, only when there is no such officer as Attorney-general.

Or by Solicitor-general during a vacancy.

The original petition must be signed by the petitioner in the presence of the solicitor, and be attested thus:—"Signed by the petitioners in the presence of A. B. solicitor to the petitioners in the matter of this petition." A certificate should also be obtained

Certificate of counsel.

left with the Attorney-general, signed by the counsel who presented the petition, to the effect that, in his opinion, the petition is proper to be presented under the Act.

The solicitor for the petitioners must also certify "that the petitioners are able to answer the costs of this application." There must also be a certificate from the solicitor or his clerk, that the petition presented to the judge is a true copy of the

) Berkhamstead Free School, 2 B. 134.  
) 29th May, 1843.  
) Re Marlborough School, 7 Jur. 1047.

(*t*) Ex parte Skinner in re Lawford Charity, 2 Mer. 456; and see 1 Bligh, N. S. 65.

Filing and confirming the Report.

original petition submitted for the sanction of her Majesty's Attorney-general.

The Order made upon the first petition is usually a reference to the Master; and when the Master has made his report, another petition may be presented, praying confirmation of the report, and that such an order as the petitioner is then entitled to, may be made by the Court. If the respondents to the petition have any objection to make to the report they may present a counter-petition, praying that the matter may be referred to the Master to review his report. The proceedings before the Master seem to be regulated by the same practice, as upon reports under decrees. The petitioners and all the respondents have a right to attend before the Master, and it would seem, from the language of Lord Redesdale, that it is not only the right but also the duty of the Attorney-general to interfere in the subsequent proceedings upon the petition, in any manner he may think for the benefit of the public (u).

Who may attend before the Master.

The report is filed in the same manner as one made under a decree, and the question whether it requires the confirmation of the Court must, as it appears, be determined in the manner before stated (x).

Application under the Act by motion.

It does not seem absolutely necessary, after one petition has been presented, that a further order should be obtained upon petition; the Court has, in some instances, permitted a second application to be made by motion. This was done by the V. C. of England, in the case of Chipping Sodbury School (y), upon the authority of an order made by Lord Eldon upon motion, under the statute 33 Geo. III. c. 54, called the Friendly Society Act, when he is reported to have said that "the jurisdiction is so fixed by the first petition that the subsequent process may be by motion (z)."

Service of the petition.

As a general rule, the petition ought to be served upon all persons whose interests will in any manner be affected by the order sought to be obtained; and in an early case upon the Act, Lord Eldon seems to have considered the mere fact that the petition did not bring a respondent before the Court in itself an objection (a). In a case where the trustees of the charity had not been served with the petition, and accordingly had not appeared, Lord Eldon, after expressing some doubt concerning his power to proceed, ultimately made an order that the trustees do, on the next

(u) 1 Bligh, N. S. 65.

(z) See ante, p. 1485.

(y) 5 Sim. 410. See also in re

Slewing's Charity, 3 Mer. 707.

(z) 10 Ves. 287.

(a) Ex parte Rees, 3 V. & B. 10.

day of petitions, show cause why the Court should not make an order according to the prayer of the petition, or such other order as to the Court shall seem meet (*b*). To whom the Petition may be presented

It may be here mentioned that it seems that there is no jurisdiction to make a parish responsible for past arrears of charitable property applied to parochial purposes, and, consequently, that the parish officers cannot be made respondents for that purpose (*a*). It was decided by the V. C. of England, that the respondents to a petition of this description were parties to the petition, and, therefore, that their case was not within the 44th Order of 1828 (*b*). It is presumed, therefore, that the mode of effecting service as well of the petition as of the subsequent proceedings, must be the same as in a cause (*c*). It is presumed also that the order, when made, may be enforced in like manner as an order made in a cause (*d*). Parish cannot be made to contribute past arrears.  
Respondents are parties to the petition.

Lastly, with respect to this Act, we may observe that the petition may be addressed either to the Lord Chancellor or to the Master of the Rolls. If addressed to the Lord Chancellor, it is usually heard by one of the Vice-Chancellors, and then a petition of appeal, or more strictly a petition for rehearing, may be presented to the Lord Chancellor (*e*). If the order is made in the first instance by the Master of the Rolls, no appeal lies to the Lord Chancellor; but in either case, whether the order be made by the Lord Chancellor or the Master of the Rolls, an appeal may be presented to the House of Lords within two years from the time when the order has been passed and entered (*f*). Where Appeal lies.

Under the 8 & 9 Vic. c. 70, intituled, "An Act for the amendment of the Church Building Acts," power is given to the Court of Chancery upon petition presented in the manner just stated, to apportion charitable bequests between new parishes created by the Act and the remaining part of the old ones.

Before leaving the subject of charities, it may be convenient shortly to refer to the Acts appointing commissioners for the investigation of charities, and conferring peculiar powers upon them. As, however, the commissions have now expired, no length of detail on the subject is necessary. Charity Commissioners.

By the 58 Geo. III. c. 91, commissioners were first appointed to inquire concerning charities in England for the education of When first appointed.

(*b*) *Ex parte Seagears*, 1 V. & B. 496.

(*a*) *Ex parte Fowler*, 1 J. & W. 70.

(*b*) *In re Willoughby's Charity*, 6 Sim. 18. See ante, 514.

(*c*) Ante, 1804.

(*d*) Ante, 1276. See however, post, pp. 2119 & 2139.

(*e*) *In re Upton Warren*, 1 M. & K. 410.

(*f*) *Ex parte Royston*, before Lord Cottenham, 22nd April, 1840.

**Charity Commissioners Act**

Power of commissioners to certify to the Attorney-general.

Who might then proceed without relators.

Before whom proceedings were heard.

the poor. By the 59 Geo. III. c. 81 commissioners was increased, and their power over charities in England and Wales. By the Act intitled "An Act for giving additional Courts of Equity regarding the management of charities," the commissioners were empowered to certify to the Attorney-general, ever it should appear that the direction of the charity was not a requisite, to certify the particulars to the Attorney-general, who might then apply either summarily by bill or by information in the Court of Chancery or the Exchequer. In such a case there were no costs, but the costs must have been paid either by the relators or by the parties brought before the court.

When such a matter or suit was instituted, it was necessarily heard in the Court of Chancery, or of the Rolls or a Vice-Chancellor. From the Court of Chancery lay to the Lord Chancellor; but from the Court of the Rolls or a Vice-Chancellor lay to the Lord Chancellor; but from the Court of the Exchequer lay to the House of Lords.

By 1 & 2 W. IV. c. 34, new committees were appointed to continue the same period; and by 2 W. IV. c. 57, the Attorney-general was empowered to institute proceedings upon the same as the commissioners in like manner as he formerly did. By the 59 Geo. III. c. 91, above stated. The Act expired on the 1st of July, 1837, by the 5 & 6 W. IV. c. 4. It then expired, so that the commissioners can now be issued as a general order to proceed under the before-mentioned Act.

## SECTION I

### *Trustee Acts*

It is intended, in this Section, to state the statutes enacted for the purpose of enabling the Attorney-general to carry into execution conveyances of estates in certain cases, where, without the aid of the Attorney-general, no title could have been made. The first of these statutes is the 11th C.

Object of the Acts.

11 Geo. IV. & 1 W. IV. c. 60.

It was drawn up by Sir Edward Sugden. It is intitled "An Act respecting conveyances and transfers of

in trustees and mortgagees; and for enabling the Courts of Equity to give effect to their decrees and orders in certain cases.”

Jurisdiction in Lunacy.

The first section of this Act repeals the former Statutes upon the same subject; the second contains the rules by which its language is to be interpreted. The third, fourth, and fifth sections relate exclusively to the Lord Chancellor's jurisdiction in lunacy, and they enable him to order a conveyance of land to be made by any lunatic, trustee, or mortgagee, and to direct a transfer of stock by any lunatic, trustee, or executor. If such trustee, mortgagee, or executor, has been found to be a lunatic by inquisition, then the person to be directed to convey or transfer, is the committee of his estate. If he has not been so found a lunatic, then the Lord Chancellor may appoint whom he thinks proper so to convey or transfer, unless the sum is payable to the lunatic himself, and exceeds seven hundred pounds, in which case it seems a commission must issue before an order can be made. If the sum is payable to the lunatic himself, and is less than seven hundred pounds, then the Lord Chancellor may, without a commission, direct to whom and in what manner the money shall be paid. The 20th section extends these provisions to “all persons being lunatic, who, by force of any law for payment of debts out of real estate, would, or hereafter may, be compellable to convey any land, if of sound mind.” No judge, other than the Lord Chancellor in his jurisdiction in lunacy, can make any order either for a reference or otherwise, under these sections (*f*), nor can the Lord Chancellor himself adopt or act upon any proceedings which have taken place in any other Court (*g*).

1st & 2nd sections.

3d & 4th sections relate to jurisdiction in lunatics.

Provide for cases of lunatic trustees, mortgagees, or executors.

20th section.

The reference to be made in the case of a conveyance being sought under these sections, from a person alleged to be a lunatic, but not so found by inquisition, is stated by Lord Brougham to be in the following form (*h*). First, an inquiry whether the alleged trustee or mortgagee was an idiot, lunatic, or of unsound mind, or incapable of managing his affairs; and if so,

Form of the reference when the alleged lunatic has not been so found by inquisition.

Secondly, whether he was seised or possessed of the estate or hereditaments and premises in the petition mentioned, or of any and what part thereof, either alone or jointly with any other and what persons, as a trustee or trustees, upon any and what trusts, or by way of any and what mortgage, and for whom, within the meaning of the Act.

(*f*) In re Shorricks, ex parte Wallis, 1 M. & C. 31, overruling Anon. 5 Sim. 322.

(*g*) In the matter of Prideaux, a lunatic, 2 M. & C. 640.

(*h*) In the matter of Pigot, 2 Rus. & M. 683.

Infant Trustees and Mortgagees.

Thirdly, whether the alleged lunatic has any and what beneficial interest therein.

Fourthly, whether there was any act done under the deed or instrument, by virtue of which the lunatic became a trustee or mortgagee or a mortgagee; and if not, then

Fifthly, a direction to inquire and call for the names of persons to be appointed such person or persons; and also,

Sixthly, to appoint a proper person to be a trustee or trustees.

When the alleged lunacy is disputed, no jurisdiction upon petition.

In a case before Lord Cottenham, the act was sought from a mortgagee and not so found by inquisition; the fact of the mortgage was considered a sufficient reason why the act should be made upon petition; and it appears that in such a case, would have been to file a petition.

Infant trustees and mortgagees.

By the 6th section, "Where any person has any land upon any trust, or by way of mortgage, and is under the age of twenty-one years, it shall be lawful by the direction of the Court of Chancery to appoint such person and in such manner as the Court shall think proper; and every such conveyance shall be as valid as if the infant trustee or mortgagee had been, and was, executing the same, of the age of twenty-one years." The section confers similar power upon the Court of the County of Lancaster, and the Court of the County of Chester, and upon certain other Courts within their respective jurisdictions.

As the conveyance has, under these circumstances, been made by the infant, it is obvious that no remedy can be obtained if the infant is not within the jurisdiction of the Court. It may be here observed that the circumstances of the case would be for his benefit, will not be a purchase under this section (*m*).

Section 8th.  
To what person it applies.

The 8th section relates to cases "where any person has any land upon any trust;" and in such cases the Court may appoint a proper person to be a trustee or trustees.

(i) In *re Walker*, Cr. & Ph. 147. not binding. For the costs in cases of this kind, see post, p. 2117. (l)

(k) In the case of a trust for sale by way of mortgage, where the object of the trust is partly for the benefit of the mortgagor, an order will be made for the sale of the land. (m) 97.



edy in the following contingencies: First, when such trustee "shall be out of the jurisdiction of, or not amenable to the process of, the Court of Chancery." Secondly, when of several such trustees, "it shall be uncertain which of them was the survivor." Thirdly, "when it shall be uncertain whether the trustee last known to have been seized (n) as aforesaid, be living or dead." Fourthly, when as to the trustee last known to have been seized "if known to be dead, it shall not be known who is his heir." Fifthly, "if any trustee seised as aforesaid, or the heir of any such trustee, shall neglect or refuse to convey such land for the space of twenty-eight days next after a proper deed for making such conveyance shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same (o)."

Relating to Leaseholds.

In what contingencies.

In all such cases, the Court of Chancery may "direct any person whom such Court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the said Court shall think proper, and every such conveyance shall be as effectual as if the trustee seised as aforesaid, or his heir, had made and executed the same."

Power of the Court in such cases.

The 9th section relates to cases "where any person is possessed of any land for a term of years upon any trust;" and it provides for the following contingencies: "where such trustee shall be out of the jurisdiction of, or not amenable to the process of, the Court of Chancery;" or "it shall be uncertain whether the trustee last known to have been possessed as aforesaid, be living or dead;" or "if any trustee possessed as aforesaid, or the executor of any such trustee, shall neglect or refuse to assign or surrender such land for the space of twenty-eight days next after a proper deed for making such assignment or surrender shall have been tendered for his execution by, or by an agent duly authorized by, any person entitled to require the same," then in every such case the Court of Chancery may direct any person whom it may think proper to appoint for that purpose, in the place of the trustee or executor, to assign or surrender such land to such person and in such manner as the Court shall think proper.

9th section relating to leaseholds.

Upon what contingency conveyance may be ordered.

The 10th section relates to cases "where any person in whose name as a trustee or executor (either alone or together with the

Section relating to transfer of stock.

(u) It must be a sole seisin, Moore v. Vinten, 12 Sim. 161.  
(o) By the 2nd section of the 4 & 5 W. IV. c. 23, a sixth contingency is provided for, namely, where any such trustee dies without an heir. See post, p. 2111.

What is the meaning of a Trustee within the Act.

In what contingencies.

Court may direct transfer.

Or order dividends to be received.

Sections relating to personality, do not provide for want of a representative.

name of any other person,) or in the (whether as a trustee or beneficially) any or any other person who shall otherwise join with any other person in transferring other person shall be beneficially entitled

And it provides that, "where such person is under the jurisdiction of, or not amenable to the jurisdiction of the Court of Chancery, or it shall be uncertain whether he is living or dead, or if any such trustee or executor neglect or refuse to transfer such stock or to pay the dividends thereof to the person entitled thereto, or if he shall direct the payment thereof respectively, or as he shall direct within one days next after a request in writing has been made to any such trustee or executor, the Court may order as aforesaid."

In such cases and upon such contingencies the Court may "direct such person as the said Court may think fit to appoint for that purpose, in the place of the trustee, executor, or other person, to transfer or join in the transfer, or to or into the name of such person, and the Court shall direct; and also to order the said person as aforesaid to receive and pay over, or join in the payment over, the dividends of such stock in such manner as the Court shall direct (o); and every such transfer, payment, or receipt, shall be as effectual as if the said trustee or executor had transferred or joined in transferring such stock, or paid, or joined in receiving and paying the same."

The three sections which have just been referred to relate to cases of real estate, leasehold estate, and stock, and it will be observed, with respect to the sections relating to leasehold and stock, that they are contained in either the second or the fourth contingency, section 8. The reason seems to be, that the sections do not tend to interfere with the jurisdiction of the Court by enabling the parties to obtain a legal remedy otherwise than by administration. In the case of a real representative, there is no power in the Court to remedy the deficiency, and consequently no provision is made for such a case (p).

(o) *In re King*, 10 Sim. 605; *Watts v. Watts*, 10 Sim. 605; *Watts v. Scriven*, 1 Beav. 223, and post, p. 2118, as to the person to be ordered to transfer. (p) *In re King*, 10 Sim. 605; *Watts v. Watts*, 10 Sim. 605; *Watts v. Scriven*, 1 Beav. 223, and post, p. 2118, as to the person to be ordered to transfer.

It will be observed that the 6th and 7th sections relate in express terms to mortgages as well as to trusts, whereas the language of the 8th, 9th, and 10th sections, is confined to the general designation of trusts. It becomes, therefore, important to inquire what limits are to be assigned to this latter expression, or in other words, what is the nature of the estate or interest which constitutes a trustee within the meaning of the Act. Before stating any of the decisions upon the subject, it will be desirable to refer to some of the subsequent sections of the Act, which tend to determine the point. The effect of the 12th section is, that where either upon account of length of time since the creation of the trust, or for other reasons, it should appear not proper that an order should be made summarily upon petition, the Court or the Lord Chancellor in lunacy may direct a bill to be filed to establish the right of the petitioner; and upon a decree in favor of such right, may make an order accordingly under the Act.

What is the meaning of Trustee within the Act.

12th section, power to order bill to be filed.

In consequence of this section, it seems to be decided that the mere circumstance of a trust having to be traced through a somewhat complicated chain of circumstances, does not preclude the jurisdiction under the Act, but only calls upon the Court for the exercise of its discretion as to whether an order should be made upon petition, or whether, for the safety of the parties interested, a bill should be directed to be filed (*q*). The effect of the 15th section is, that the circumstance of a trustee having some beneficial estate (*r*), or interest in the same subject, or having some duty as trustee to perform, does not prevent him from being a trustee within the meaning of the Act, but in such a case there is a like discretion to direct a bill to be filed to establish the right of the party applying for the conveyance.

In a complicated trust the Court may direct a bill to be filed;

and in certain other cases.

The 16th and 17th sections relate to cases where land has been contracted to be sold by a deceased vendor, and a decree has been made for a specific performance of the contract, and their effect is, that under such circumstances, if the land is vested in the heir, then the heir of the vendor is a trustee within the meaning of the Act. If, however, the deceased vendor has devised the land contracted to be sold, then the Court may, by the decree for the specific performance of the contract, or by any other decree, or any decretal order, or upon petition in the cause, direct any tenant for life under the devise, or other person having a limited interest, or the first executory devisee thereof to convey the fee simple, and

16th and 17th sections providing for land contracted to be sold by a deceased person.

(*q*) In the matter of *The De Clifford Estates*, 2 My. & K. 624; ex parte *Merry*, 1 My. & K. 677; ex parte *Dover*, 5 Sim. 500.  
(*r*) See *Hutchinson v. Stevens*, 5 Sim. 498.

When a mortgagee is a Trustee.

In the case of a purchase by one person in trust for another.

18th section, constructive trusts.

Husband of a *feme covert* within the meaning of the Act is himself also a trustee within the Act.

When mortgagees are within the Act.

every such conveyance shall be as effectual as if the person who shall make the same were seised of the fee simple, or the whole estate contracted to be sold.

The 16th section also provides, that where one person shall have purchased an estate in the name of another, but the nominal purchaser shall on the face of the conveyance appear to be the real purchaser, and there shall be no declaration of trust from him, and a decree of the Court shall have declared such nominal purchaser to be a trustee for the real purchaser, then such nominal purchaser, or his heir, shall be a trustee within the meaning of the Act.

The 18th section extends the provisions of the Act to every other case of a constructive trust, or a trust arising or resulting by implication of law; but, in every such case, where the alleged trustee has or claims a beneficial interest adversely to the party seeking a conveyance or transfer, no order shall be made for the execution of a conveyance or transfer by such alleged trustee until after it has been declared by the Court of Chancery in a suit regularly instituted in such Court that such person is a trustee for the person so seeking a conveyance or transfer. The Act does not, however, extend to cases upon partition, or cases arising out of the doctrine of election in equity, or to a vendor except in cases expressly provided for.

By the 19th section, where any *feme covert* would be a trustee, mortgagee, heir, or executor, within the provisions of the Act, if she were an infant, or lunatic, or out of the jurisdiction, or not amenable to the process of the Court, or had refused or neglected to execute a conveyance, transfer, &c., and the concurrence of her husband should be necessary in any conveyance, transfer, &c., then such husband, whether under disability or not, is a trustee within the meaning of the Act.

Having now stated the sections of the Act which tend to solve the question what is a trustee within the meaning of the Act, we shall refer to the decisions upon the subject, and the effect of subsequent statutes.

Mortgagees are clearly within the language of the 6th and 7th sections, so that when the disability arises from infancy, and the infant is within the jurisdiction of the Court, these sections provide a remedy; but there has been considerable doubt as to the circumstances under which mortgagees or their heirs can be considered as trustees under the 8th section. At first it was decided that a mortgagee did not come within the description of a person "seised of land upon any trust" — so that when a mortgagee in fee died intestate and his heir was not known, no remedy was provided,

and no conveyance of the legal estate could be effected (s). The heir of a mortgagee might be a trustee in some senses, although the mortgagee himself was not a trustee; but it was determined that the heir of a mortgagee was not a trustee of that clear, positive description contemplated by the 8th section, and consequently there was no remedy when such heir was out of the jurisdiction (t). After this construction had been put upon the 8th section of the Trustee Act, and become established, the stat. 4 & 5 W. IV. c. 23, intituled "An Act for the amendment of the law relative to the escheat and forfeiture of real and personal property holden in trust," passed — and by the 2nd section enacted, "That where any person seised of any land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land in like manner as is provided by the 'Trustee Act,' in case such trustee or mortgagee had left an heir, and it was not known who was such heir" (u).

Effect of 1 & 2  
Vic. c. 69.

Originally  
mortgagees  
and their heirs  
held not with-  
in the 8th sec-  
tion.

Effect of stat.  
4 & 5 W. IV.  
c. 23.

This section, as we have seen, provides, with respect to a trustee, for another contingency in addition to those before stated, as included in the 8th section of the Trustee Act, and it also makes this contingency applicable to the case of a mortgagee in language leading to the conclusion that the legislature considered all contingencies mentioned in the 8th section to relate to a mortgagee as well as to a trustee. Acting upon this legislative interpretation of the Trustee Act, Lord Langdale, M. R., construed the 8th section as including a mortgagee (x), and the V. C. of England also made an order for the conveyance of an estate where the heir of the mortgagee was unknown, upon a petition, the prayer of which he had previously refused (y). Doubts, however, existed as to the propriety of these decisions, and consequently the stat. 1 & 2 Vic. c. 69, was passed, which, reciting the 8th section of the Trustee Act, and the 2nd section of the 4 & 5 W. IV. c. 23, above mentioned, enacted, with respect to a case "Where any person seised of any land by way of mortgage, shall have departed this life without having been in possession of such land, or in the

Effect of 1 & 2  
Vic. c. 69.

To what de-  
scription of  
mortgagees  
applicable.

(s) In re Goddard, 1 M. & K. 25; in re Stanley, 5 Sim. 320.

(t) In re Dearden, 3 M. & K. 508; see also ex parte Payne, with respect to the heir of a mortgagee, 6 Sim. 636.

(u) It may be useful to refer to the following cases which have occurred under this Act, ex parte Fauntleroy, V.C. 27 March, 1836; ex parte Turn-

er, M. R. 16 April, 1835; ex parte Blizard, M. R. 18 June, 1835; ex parte Craven, 3 Nov. 1835, report confirmed, V. C. 9 January, 1836; ex parte Gregson, 30 July, 1834; re Edwards, 18 Dec. 1841; and ex parte Wharton, 5 Dec. 1834.

(x) Ex parte Whitton, 1 Keen, 278.

(y) In re Stanley, 7 Sim. 170.

Effect of 1 & 2  
Vic. c. 60.

In what con-  
tingencies.

Power of  
Court to order  
conveyance.

Former Acts  
not to extend  
to any other  
case of  
mortgage.

receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been or shall be paid to his executors or administrators," that in such a case, upon any of the following contingencies,—First, where "the devisee or heir or other real representative, or any of the devisees or heirs or other real representatives of such mortgagee, shall be out of the jurisdiction or not amenable to the Court of Chancery." Secondly, where "it shall be uncertain of several devisees or representatives who were joint tenants, which of them was the survivor." Thirdly, where "it shall be uncertain whether any such devisee, or heir, or representative, be living or dead." Fourthly, "where if known to be dead it shall not be known who was his heir." Fifthly, "where such mortgagee, or any such devisee, or heir, or representative shall have died without an heir." Sixthly, "where any such devisee, or heir, or representative shall neglect or refuse to convey for twenty-eight days after due tender of a conveyance by a person entitled to the same or his agent."

Then in all such cases, the Court of Chancery may "direct any person whom such Court may think proper to appoint for that purpose in the place of the devisee, heir, or representative, whether such devisee, heir, or representative shall or shall not have a beneficial interest in the money paid to the executor or administrator as aforesaid, to convey such land in like manner," as by the Trustee Act the Court may appoint a person to convey in the cases there mentioned.

By the third section it is enacted and declared, that the said recited Acts, or either of them, shall not be construed to extend to any cases of any person dying seised of any land by way of mortgage, other than such as are therein expressly provided for.

It will be observed that the words of this last section would, if taken quite literally, repeal the sixth section of the Trustee Act (z), so far as it relates to infant mortgagees; but as the preamble of the 1 & 2 Vic. c. 69, does not recite this 6th section, and as none of the doubts which rendered necessary the 1 & 2 Vic. c. 69, arose upon the 6th section, (which clearly by express words includes the case of mortgagees) the V. C. of England has decided that the recent statute is not to be construed as preventing the 6th section of the Trustee Act from applying to the case of an infant heir of a mortgagee (y).

(z) Ante, p. 2105.

(y) In *re Gathorne*, 8 Sim. 394; and in the matter of *Kent*, 9 Sim. 501; see, however, as to the propriety of these decisions, 1 Sug. V. & P. 325, n. 10th edition.

On carefully examining the cases provided for by the 1 & 2 Vic. c. 69, it appears to have been the intention of the legislature <sup>Effect of 1 & 2 Vic. c. 69.</sup> **not** under any circumstances to make the mortgagee himself during <sup>Object of the Act 1 & 2 Vic c. 69.</sup> **his** lifetime a trustee within the meaning of any of the Acts (z); **but** when a mortgagee has died without ever having been in possession, and the mortgage money has been paid to his personal representative, then the legislature seems to have intended to treat the real representatives of the mortgagee both as trustees themselves, and also as the representatives of a trustee within the meaning of the Act.

In carrying out this object, there has been one omission apparently quite unintentional, viz. that the fourth contingency (a), although it provides for the case when it shall not be known who is the heir of the heir of such a mortgagee, does not provide for the case when it shall not be known who is the heir of such a mortgagee himself. The V. C. of England has, however, held that notwithstanding this accidental omission, and the express language of the third section of 1 & 2 Vic. c. 69, the Trustee Act still extends to such a case (b). <sup>Omission in the language of that Act.</sup>

Lastly, it may be observed, with respect to the subject of mortgagors, that in general as a mortgagor has not the legal estate, Courts of Equity can deal with his interest without the aid of the statute. Where, however, the mortgage was equitable, and a decree had been made for sale of the estate, Sir J. Wigram, V. C., held that the mortgagor was a trustee within the Act for the mortgagee, and a person was appointed to convey to the purchaser in place of the mortgagor who was out of the jurisdiction (c). <sup>Case of mortgagors.</sup>

It appears from the case of Price v. Dewhurst (d), that the Act is confined to cases in which the interest in the subject of the trust or mortgage can be conveyed or transferred at Law, consequently an assignment of a mortgage debt by a creditor is not a case with- <sup>To what subject matter the Act applies.</sup>

(z) Green v. Holden, 1 Beav. 207.

(a) Ante, see last page.

(b) In re Wilson, 8 Sim. 392. In re Williams, 9 Sim. 642; but see Sugden, V. & P. 10th ed. vol. i. p. 398, n. From a case in re Thomson, 12 Sim. 392, it appears that the V. C. of England made an order where the heir of the mortgagee was out of the jurisdiction under the Trustee Act, without reference to the question whether the mortgage-money had been paid, or the ancestor had ever been in possession, so as to bring the case within the 1 & 2 Vic. c. 69. On reference to the original petition, it

appears that the report is correct, but the last-mentioned statute must have escaped his Honor's recollection. In a case before Sir J. Wigram, V. C. where the money was paid off pending the reference, the Master found the heir was a trustee not for the petitioner or the executor, but for the mortgagors, whereupon the Court allowed the petition to be amended, by making it the petition of the mortgagor, and then directed the conveyance, in re Manifold, 4 Hare, 506.

(c) King v. Leach, 2 Hare, 57.

(d) 8 Sim. 617.

In the case of  
Friendly  
Societies.

21st section  
enabling Court  
to make orders  
in charities  
and friendly  
societies.

22nd section  
giving power  
to appoint new  
trustees.

In what cases  
the power is  
conferred.

in the Act. It may also be observed, to land out of the Queen's dominions, sections 26 and 29 to all land and stock belonging to her Majesty, with the exception of Ireland also, so far as the nacy of the Lord Chancellor is concerned.

By the 21st section the provisions of cases of petitions in which the Lord Chancellor of Chancery, can, by law, grant orders without suit, either in matters relative to benefit or friendly societies.

There does not appear to have been any section, but upon the 57th Geo. III. c. 13, Sir John Leach, upon petition, that a standing in the name of two trustees of whom had absconded, should be transferred into his own name, jointly with that of the room of him who had absconded.

Section of 1 W. IV. c. 60, are the same as 39, and with respect to them His Honor's attention must have been to enable the Court upon petition in matters of charity and there was some obscurity in the expression.

By the 22nd section, the Lord Chancellor of Chancery may, upon an application for a conveyance or transfer where the creation of a trust or other circumstances require direct a conveyance or transfer to be made by trustees without compelling the parties to file a bill for that purpose, although by deed or instrument creating or declaring stock to appoint new trustees.

This section does not confer upon the Court power to appoint new trustees upon petition at the commencement of the section "from and after the first day of January next following the coming into operation of this Act" show that it is only where the party might apply by petition under the Act: that is, in cases of disability.

(e) In the matter of a Friendly Society, 1 S. & S. 82. In the matter of the Heanor Friendly Society, 1 Beav. 508. See also *ex parte Norrish*, Jacob, 162, where the Court held that the petition was not validly presented where the rules of the statute were not complied with.



of the infancy or the lunacy of a trustee, or the fact of his being out of the jurisdiction (e) of the Court. In such cases when there is a disability of the sort pointed out by the Act, and a consequent right in the petitioner to apply under the former section, this 22nd section, enables the Court to appoint new trustees, although no bill has been filed, and there is no power in the instrument creating the trust (f).

Appointment  
of new Trustees.

Moreover, even though the instrument creating the trust do contain a power of appointment, still there is jurisdiction in the Court under this section in the event of the party to appoint or convey being under a disability to appoint new trustees (g). There is, however, no jurisdiction to make such an appointment except in a plain case, or where there has been a recent creation of the trust (h).

By the 23rd section, where all the persons in whom any land may have been vested in trust for any charity, or charitable or public purpose, shall be dead, the Court of Chancery may, on the petition of the persons administering the same, or of any person on behalf thereof, direct any Master or other officer of the Court to cause two successive advertisements to be inserted in the London Gazette, and in one or more of the newspapers circulated in the county, city, or place where such land shall be situated, giving notice that the representative of the last surviving trustee do within twenty-eight days appear or give notice of his title to such Master or other officer, and prove his pedigree or other title as trustee; and if no person shall appear to give such notice within such twenty-eight days, or the person who may appear or give such notice, shall not within thirty-one days after such appearance or notice prove his title to the satisfaction of such Master or other officer, then the Court may appoint any new trustees for such charity, or charitable or public purpose, and such land may be conveyed to such new trustees by any person whom the said Court respectively may direct for that purpose by virtue of the provisions in this Act without the necessity of any decree (i).

Power to appoint new trustees of charities.

(e) In re The Earl of Mayo, 1 Lloyd & Gould (cas. tem. Plunket); in re Pennefather, 2 Dr. & W. 292; in re Hartford, ib.; Harte v. Lord French, ib.; in re Byrne, 1 Jo. & Lat. 535.

(f) In re Fitzgerald, 1 Lloyd & Gould, 20; in re Ryley, 3 Hare, 614; in the matter of Welch, 3 M. C. 292.

(g) In re Fauntleroy, 10 Sim. 252.

(h) In re Whitley, 1 Lloyd & Gould, 23.

(i) For orders made under this section, see Nightingale's Charity, 3 Hare, 336; and in the matter of Bishop Gore's Charity, 4 Dr. & W. 270. A similar power was conferred upon the Court of Chancery by 2 & 3 Will. IV. c. 57, s. 3.

Mode of Proceeding.

Power to make decree against absent trustee.

Under the 24th section, power is given to the Court of Chancery in any suit, when it shall be made to appear to the Court by affidavit (*k*) that diligent search and inquiry has been made after any person made a defendant who is only a trustee, to serve him with the process of the Court, and that he cannot be found, to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to them to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared and filed his answer thereto.

Mode of application.

The 11th section prescribes the mode of applying to the Court, and enacts, that "Every direction or order to be made in pursuance of this Act by the Lord Chancellor entrusted as aforesaid, or by the Court of Chancery, or by any other Court thereinbefore mentioned, shall be signified by an order to be made in any cause depending in such Court respectively, or upon petition in the lunacy or matter, and such person as hereinafter is mentioned shall be the petitioner, whether such person be or be not under any legal disability, (that is to say,) if the same shall relate to a conveyance, transfer, receipt, or payment, to or in such manner as may be directed by any person beneficially entitled (*l*), then, upon the petition of the person, or some or one of the persons beneficially entitled to the land, stock, or dividends to be conveyed, transferred, received, or paid; and if the same shall relate to a conveyance in order to vest any land or stock in a new trustee duly appointed by virtue of some power or authority in some instrument creating or declaring the trusts of such land or stock, or by the Court of Chancery, either alone or together with any continuing trustee, then, upon the petition either of the trustee, or some or one of the trustees in whom the same shall be proposed to be vested, or of any person having an interest therein; and if the same shall relate to the conveyance of an estate in mortgage, then, upon the petition of the person or some or one of the persons entitled to the equity of redemption thereof, or of the person or some or one of the persons entitled to the monies thereby secured, or the guardian or committee or some or one of the guardians or committees of the person entitled to such monies if an infant or lunatic."

Who to be petitioner.

The regular course is to entitle the petition in the matter of the Act of Parliament, and also in the matter of settlement or particular trust to which it relates, although the title has been frequently

(*k*) *Moore v. Vinten*, 12 Sim. 161.      (*l*) *In re King*, 10 Sim. 605.

efficient in one or other of these respects (*m*). There are usually two petitions, by the first of which a reference is made to the Master to inquire whether the infant, lunatic, &c., is a trustee within the meaning of the Act, and whether he is out of the jurisdiction, &c. This reference is not required by the Act of Parliament, and it is consequently a matter in the discretion of the Court whether, upon the presentation of the first petition, a final order should be made, or whether such a reference should be directed to the Master, and in a clear case such a reference will be dispensed with (*o*). The first petition, therefore, strictly ought to pray for the final order, leaving it to the Court to direct a reference if necessary for its own satisfaction previously to making a final order. The Master's report, under the order of reference, cannot be excepted to (*p*). Upon the second petition the Master's report is confirmed, and the final order made. It is said that the opinion of Sir Edward Sugden was frequently stated in Ireland to be, that no judge ought to make a reference under the Act unless he was of opinion that if the case stated by the petition were proved it would fall within the Act (*q*). The report also should not state merely that a party is a trustee, but the documents which make out the trust should be stated on the face of the report to enable the Court to judge of the propriety of the conclusion (*r*).

Form of Report

Prayer of the petition.

Under Acts of Parliament which direct application to be made by petition, the Court can in general exercise its jurisdiction only in the mode prescribed (*s*); but under this particular Act the jurisdiction is not so confined. Consequently, when a decree has been made in a suit declaring an infant heir to be a trustee, and the right of the party to a conveyance thus established by a decree, the Court will, at the same time, without requiring a petition, direct a conveyance by the infant heir under the Act (*t*). If, however, the direction to convey cannot, according to the ordinary practice of the Court, be made contemporaneously with the general decree, a separate petition under the Act is requisite; thus, in a suit for raising legacies against an infant heir of a devisee whose estate is charged with legacies, the decree directs a sale to raise the requisite amount, which direction is a good ground for the exercise by the Court of its statutory power to order a conveyance;

When order under this Act may be made upon decree.

If the conveyance would in general be ordered upon the decree.

(*m*) *In re Law*, 4 Beav. 510, and ante, p. 2094.

(*o*) *Parker v. Burney*, 1 Beav. 492.

(*p*) Ante, p. 1489.

(*q*) Sugden's Act by Jemmett, p. 313; *Cockell v. Pugh*, 6 Beav. 293; *ex parte Shick*, 5 Sim. 281.

(*r*) *In re Pardon*, 1 Dr. & W. 500.

(*s*) *Baynes v. Baynes*, 19 Ves. 462.

(*t*) *Miller v. Knight*, 1 Keen, 129;

see also *Langford v. Auger*, 4 Hare, 313; *Broom v. Broom*, 3 My. & K. 443.

Costs.

yet, as the practice is not to order a conveyance to be made until the sale has taken place and the actual purchaser has been ascertained, the presentation of a separate petition under the Act becomes necessary (u).

Costs of proceedings under the Act.

The 25th section expressly enables the Lord Chancellor in lunacy, and the Court of Chancery to order the costs and expenses of, and relating to, the "Petitions, orders, directions, conveyances, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the land or stock, or the rents or dividends in respect of which the same respectively shall be made, or in such other manner as the said Lord Chancellor or Court shall think proper" (x).

Mode in which discretion exercised.

With respect to the manner in which this jurisdiction is exercised, the general rule seems to be, where the petition has been rendered necessary by the fact of the heir of the mortgagee being under disability, that the expense of the petition and of the proceedings consequent thereupon in order to give him a capacity to convey, must be paid by the mortgagor (y). It is true, that, in *ex parte Richards* (z), Lord Eldon decided that the costs of the committee of a lunatic mortgagee requisite to enable him to re-convey to the mortgagor under the statute 4 Geo. II. c. 10, including the costs of the reference, should be paid out of the lunatic's estate; and that, as to this point, it was immaterial whether the application were made by the mortgagor, or by the committee. Lord Cottenham has, however, observed, with reference to this case, that he had great difficulty in understanding it; and that when compared with the other cases upon the subject it would seem to make a difference between the case where the lunatic was a bare trustee, and one in which he was a mortgagee; and that being unable to see any solid ground for such a distinction, he should hesitate to follow the authority of that case whenever an opportunity for reconsidering the point should occur.

Whether the costs of a lunatic should be paid by committee.

Costs of trustee paid by *cestui que trust*.

It certainly seems clear that the costs of the committee of a lunatic or infant trustee must be borne by the *cestui que trust* (a). This rule, however, does not apply where a vendor, after entering into a contract, dies, leaving an infant heir, and a suit is instituted by the purchaser for specific performance. In such a case, the Court, upon the ground that the petition is caused by an omission of the vendor in allowing the estate so to descend, will order the

(u) *Walters v. Jackson*, 12 Sim. 278; *Fellowes v. Till*, 5 Sim. 319.

(z) *In re King*, 10 Sim. 605.

(y) *Ex parte Ommany*, 10 Sim. 298.

(z) 1 Jac. & Walk. 264.

(a) *Ex parte Pearce*, T. & R. 385; *ex parte Tutin*, 3 V. & B. 149; *ex parte Cant*, 10 Ves. 554.

costs to be paid out of the purchase-money (b). In some cases, where a trustee has improperly made a petition necessary, he will himself be ordered to pay the costs of it (c). Lord Langdale, M. R., however, refused to make a defendant pay the costs of a petition, rendered necessary by his default in not obeying an order of Court for the sale of an estate (d).

How Proceedings enforced.

*Secus*, in case of vendor dying after contract for sale.

To compel obedience to any order made under this Act for the execution of a conveyance, or any other object, the practice was, if the refusing person were not a party to the cause, to move that he might convey within a week after service, and if he did not obey, to move that he might stand committed (e). If he was a party to the cause, the ordinary process of contempt was adopted. Now, if the order is made in a cause, although against a person not a party to the cause, the ordinary process may be applied (f); but there is still room to doubt whether the former practice must not prevail when the order to be enforced is made upon petition without suit (g).

Trustee ordered to pay costs. Mode of compelling obedience.

By the 13th section, "Any committee, infants, or other persons directed by virtue of this Act, to make, or join in making any conveyance or transfer, or receipt or payment, shall and may be compelled by the order to be obtained as hereinbefore is mentioned, to make and execute the same in like manner as trustees of full age, and of sane mind, memory, and understanding, are compellable to convey, transfer, or receive, and pay over the trust estates or funds vested in them respectively."

As against infants and committees.

As to the manner in which the conveyance should be made, the V. C. of England in *ex parte Foley* (h) said, that all that was necessary was that the person appointed to convey the property should execute the tender or deed, and that it should be expressed in the attestation clause, that he had executed it in the place of the retiring trustee, in pursuance of the order made upon the petition.

Form of conveyance.

The 14th section provides, that "where the person or any of the persons to whom any money shall be payable in or towards the redemption or discharge of any mortgage or incumbrance of which a release or conveyance shall be obtained under the powers of this Act shall be an infant, it shall be lawful for the person by whom

Power to pay money belonging to the party into Court.

(b) *Prytharch v. Havard*, 6 Sim. 9; *Midland Counties Railway Company v. Westcomb*, 11 Sim. 57, which case, although not under this Act, exhibits the manner in which the discretion of the Court is exercised; see also *Hanson v. Lake*, 2 Y. & C. 328.  
(c) *Manners v. Charlesworth*, quoted Sugden's Acts in Kennett, p. 156; see also *Jones v. Lewis*, 1 Cox, 199.  
(d) *Robinson v. Wood*, 5 Beav. 246.  
(e) *In re Beech*, 4 Mad. 128.  
(f) *Lane v. Oliver*, 2 Hare, 37.  
(g) See post, p. 2139.  
(h) 8 Sim. 396.

How Proceedings enforced.



Who shall be named in the orders of the Court for making transfers.

such money shall be payable to pay the same into the Bank of England, in the name and with the privity of the Accountant-general, to be placed to his account in trust in any cause then depending concerning such money; or if there shall be no such cause, to the credit of such infant, subject to the order and disposition of the said Court respectively, or to such person or persons, or in such other manner as the said Court respectively shall direct; and the said Court shall, and is hereby empowered to order any money which shall be so paid into Court, to be invested in the public funds, and to order distribution thereof, or payment of the dividends thereof, as to the said Court shall seem reasonable."

The 32nd section enacts, "That in all cases in which orders shall be made in pursuance of this Act for the transfer of stock, the person to be named in such order for making such transfer shall either be the committee of the estate of the person being lunatic, in whose place such transfer shall be made, or a co-trustee, or co-executor of the person in whose place such person shall be directed to transfer, or some officer of the company or society in whose books the same respectively shall be directed to be made; and where such transfer shall be directed to be made in books kept by the Governor and Company of the Bank of England, such officer shall be the Secretary or Deputy Secretary, or Accountant-general for the time being of the said Governor and Company, or his deputy."

#### SECTION IV.

##### *Railway Acts.*

It is now intended to state the effect, as far as the practice of the Court of Chancery is concerned, of certain statutes enacted with respect to public works in general; but which have recently become of great practical importance in consequence of their being applicable to railways.

1 & 2 Vic. c. 117.  
Railway Deposit Act.

The first of these statutes is the 1 & 2 Vic. c. 117, intitled "An Act to provide for the custody of certain monies paid in pursuance of the standing orders of either House of Parliament, by subscribers to works or undertakings to be effected under the authority of Parliament."

The 1st section enacts, "That in all cases in which any sum of money is required by any standing order of either House of Parlia-

ment, either now or hereafter to be in force, to be paid by the subscribers to any work or undertaking which is to be executed under the authority of an Act of Parliament, if the director or person, directors or persons, having the direction or management of the affairs of any such proposed work or undertaking, or any five of them, shall apply to the Chairman of the Committees of the House of Lords with respect to any such money required by any standing order of the House of Lords, or to the Speaker of the House of Commons, with respect to any such money required by any standing order of the House of Commons, the said Chairman or the said Speaker may by warrant or order under his hand direct that such sum of money shall be paid in manner hereinafter mentioned; that is to say, into the Bank of England, in the name and with the privity of the Accountant-general of the Court of Exchequer in England, if the work or undertaking in respect of which the sum of money is required to be paid is intended to be executed in that part of the United Kingdom called England, or into the Bank of England, in the name and with the privity of the said Accountant-general, or into any of the banks in Scotland, established by Act of Parliament or Royal Charter, in the name and with the privity of the Queen's Remembrancer of the Court of Exchequer in Scotland, at the option of the person or persons making such application as aforesaid, in case such work or undertaking is intended to be executed in that part of the United Kingdom called Scotland, or into the Bank of Ireland, in the name and with the privity of the Accountant-general of the Court of Chancery in Ireland, in case such work or undertaking is intended to be made or executed in that part of the United Kingdom called Ireland; and every such application as aforesaid to the said Chairman or Speaker shall be made in writing, and be signed by the director or directors, or person or persons having the management of the said work or undertaking, or by any five of them, and therein shall be stated the name or description of such work or undertaking, and name and place of abode, or the names and places of abode of such director or directors, person or persons, and the sum of money required to be paid, and the bank and name into and in which the same is to be paid, and such particulars shall also be set forth in every such warrant or order, and such warrant or order shall be a sufficient authority for the Accountant-general of the said Court of Exchequer in England, the Queen's Remembrancer of the Court of Exchequer in Scotland, and the Accountant-general of the Court of Chancery in Ireland respectively, to permit the sum of money directed to be paid by such warrant or order to be placed

*Railway Deposit Act.*

Application to Chairman of Committee of House of Lords or Speaker of the House of Commons.

Warrant or order of the Chairman or Speaker.

Form of application to the Chairman or Speaker.

Warrant of the Chairman or Speaker sufficient authority for the Accountant-general.

Payment out  
of Court.

Jurisdiction  
transferred  
from the Court  
of Exchequer  
to the Court of  
Chancery.

Payment into  
the Bank to  
the Account-  
ant-general of  
the Court of  
Chancery.

Investment of  
money when  
paid into the  
Bank.

In what cases  
application  
may be made.

to an account opened or to be opened in his name in the bank mentioned in such warrant or order."

We have before seen that by 5 Victoria c. 5, the jurisdiction of the Court of Exchequer in Equity is abolished, and the same statute directs the Accountant-general of that Court to transfer the funds standing in his name to the Accountant-general of the Court of Chancery, to be applicable to such purposes as they were respectively applicable to, so that now all the statutory provisions of the 1 & 2 Vic. c. 117, relating to the Court of Exchequer, are made applicable to the Court of Chancery.

By 1 & 2 Vic. c. 117, sec. 2, "The person or persons named in such warrant or order, or the survivors or survivor of them, or any five of them, may pay the sum of money mentioned in such warrant or order into the bank mentioned in such warrant or order, in the name and with the privity of the officer or person in whose name such sum shall be directed to be paid by such warrant or order, to be placed to his account there, *ex parte* the work or undertaking mentioned in such warrant or order, and every such sum so paid in, or the securities in or upon which the same may be invested as hereinafter mentioned, shall there remain until the same or such securities as aforesaid shall be paid out of such bank in pursuance of the provisions of the said Act."

By the 3rd section of the same Act, it is enacted, "That if the person or persons named in such warrant or order, or the survivor or survivors of them, or any five of them, desire to have invested any sum so paid into the Bank of England, or the Bank of Ireland, the Court, in the name of whose Accountant-general the same may have been paid, on a petition presented to such Court, in a summary way, by him or them, may order that such sum shall, until the same be paid out of Court in pursuance of this Act, be laid out in the three per centum consolidated, or three per centum reduced Bank Annuities, or any government security or securities."

By the 4th section of this Act, it is enacted, "That on the termination of the session of Parliament, in which the petition or bill for the purpose of making or sanctioning any such work or undertaking, shall have been introduced into Parliament, or if such petition or bill shall be rejected or finally withdrawn by some proceeding in either House of Parliament, or shall not be allowed to proceed, or if an Act be passed authorizing the making of such work or undertaking; and if in any or either of the foregoing cases the person or persons named in such warrant or order, or the survivor or survivors of them, or the majority of such persons apply by petition to the Court in the name of whose Accountant-



general the sum of money mentioned in such warrant or order shall have been paid, or to the Court of Exchequer in Scotland, in case such sum of money shall have been paid in the name of the said Queen's Remembrancer, the Court, in the name of whose Accountant-general or Queen's Remembrancer such sum of money shall have been paid, shall, by order, direct the sum of money paid in pursuance of such warrant or order, or the stocks, funds, or securities, in or upon which the same are invested, and the interest or dividends thereof, to be transferred and paid to the party or parties so applying, or to any other person or persons whom they may appoint, in that behalf; but no such order shall be made in the case of any such petition or bill being rejected, or not being allowed to proceed, or withdrawn, unless it be proved by the certificate of the Chairman of Committees, if the said petition or bill was rejected, or not allowed to proceed, or withdrawn in its passage through the House of Lords, or of the said Speaker, if the said petition or bill was rejected, or not allowed to proceed, or withdrawn during its passage through the House of Commons, that the petition or bill has been either so rejected, or not allowed to proceed, or so withdrawn by some proceeding in one or other House of Parliament, which certificate the said Chairman or Speaker shall grant on the application in writing of the person or persons, or the majority of the persons named in such warrant or order, or the survivor or survivors of them, and every such certificate shall be conclusive proof of such rejection, or not proceeding, or withdrawal."

Payment out of Court.

By what persons.

To what Court

Upon what evidence.

The statute above mentioned relates to the payment of money into Court previous to the passing of the Act authorizing the execution of the work or undertaking. For the purpose of such payment, the parties must, as we have seen, obtain the order or warrant of the Chairman of Committees of the House of Lords, or the Speaker of the House of Commons, for the payment of the sum required by way of deposit. This warrant is in itself sufficient authority for the Accountant-general, without any order of the Court of Chancery being necessary, Upon the production of the warrant of the Speaker or Chairman, the Accountant-general signs a certificate, mentioning the warrant under the authority of which the persons named in the certificate are to pay the sum therein specified, and directing it to be placed to his account, as Accountant-general, to the credit of the particular account therein mentioned. When the money has been accordingly paid

Method of paying Deposit.

Investment of deposit.

Payment of deposit.

To whom order for payment will be made.

into the Bank in the manner before pointed out (z), a receipt should be brought into the Accountant-general's Office from the Bank for such payment. The Accountant-general will then sign a certificate of such payment, and annex it to the bank receipt for the purpose of being entered and filed in the Report Office, from whence office copies may be taken.

If, then, the parties are desirous that the sum so paid in should be invested, they may apply by petition to the Court for that purpose. When an order for investment has been made, it is carried into effect in the manner before stated (a).

At the termination of the session, or upon certain other contingencies mentioned in the Act, provision is, as we have seen, made for the repayment of the money to the parties by whom it was deposited. The petition for this purpose should be in the name of the persons by whom it was deposited, and the order will be for payment to them. In a case where the petition was presented by all the persons in whose name the money had been deposited, praying that the amount might be paid to the banker of the company, the V. C. made an order accordingly (b). Sir J. L. Knight Bruce, V. C., has, however, refused to order payment to one of the five petitioners by whom the money had been paid in, there not being any regular appointment by power of attorney (c). And it appears that the V. C., Sir James Wigram (d), also refuses to make an order for payment in any other form than to the persons by whom it was paid in, unless regular proof is given of the appointment of a banker or some other person to receive it.

We have next to consider the manner in which the Court of Chancery has to administer the compensation money paid by railway companies in respect of lands taken for the purposes of their Act, when the persons from whom it is taken have only a limited interest in the land, or are under disabilities. Till very recently each company had to include in their particular Act the powers and provisions for these purposes; but now by the statute, 8 & 9 Vict. c. 18, intituled "An Act for consolidating in one Act certain provisions usually inserted in Acts authorizing the taking of lands for undertakings of a public nature," sundry provisions hitherto usually introduced into Acts of this description are made generally applicable.

(z) Ante, p. 2025.

(a) Ante, p. 2027.

(b) In re the Warwick and Leamington Railway Company, 13 Sim. 31.

(c) In re The Direct London and Portsmouth Railway Company, 19 Dec. 1845.

(d) 1st August, 1845.

The 69th section enacts, that " If the purchase-money or compensation which shall be payable in respect of any lands or any interest therein purchased or taken by the promoters of the undertaking from any corporation, tenant for life or in tail, married woman seised in her own right or entitled to dower, guardian, committee of lunatic, idiot, trustee, executor, or administrator, or person having a partial or qualified interest only in such lands, and not entitled to sell or convey the same except under the provisions of this or the special Act, or the compensation to be paid for any permanent damage to any such lands, amount to, or exceed the sum of 200*l.*, the same shall be paid into the Bank in the name and with the privity of the Accountant-general of the Court of Chancery in England, if the same relate to lands in England or Wales, or the Accountant-General of the Court of Exchequer in Ireland, if the same relate to lands in Ireland, to be placed to the account there of such Accountant-general, *ex parte* the promoters of the undertaking, (describing them by their proper name,) in the matter of the special Act (citing it,) pursuant to the method prescribed by any Act for the time being in force for regulating monies paid into the said Courts, and such monies shall remain so deposited until the same be applied to some one or more of the following purposes; (that is to say) —

Practice as to Compensation Money.

When payable into the Court of Chancery.

How paid in.

How described

In the purchase or redemption of the land tax (*e*) or the discharge of any debt or incumbrance affecting the land, in respect of which such money shall have been paid, or affecting other lands settled therewith to the same or the like uses, trusts, or purposes; or

In what manner to be applied.

Land tax.

In the purchase of other lands (*f*), to be conveyed, limited, and settled upon the like uses, trusts, and purposes, and in the same manner as the lands, in respect of which such money shall have been paid, stood settled; or

Purchase of other lands.

If such money shall be paid in respect of any buildings (*g*), taken under the authority of this or the special Act, or injured by the proximity of the works, in removing or replacing, such buildings, or substituting others in their stead, in such manner as the Court of Chancery shall direct; or

In respect of buildings.

(*e*) There have been no cases as yet decided upon this Act, but it may be convenient to refer to some of the cases decided upon similar provisions in former Acts. The Court has allowed a tenant for life who had redeemed the land tax under the Act, to reimburse himself out of the proceeds of the lands purchased by the

Company, *ex parte* Worlthwich, 1 Y. & C. Exch. Rep. 166.

(*f*) Where the lands to be purchased are of greater value than the fund in Court. See *ex parte* Newton, 4 Y. & C. Exch. Rep. 518.

(*g*) See *ex parte* Shaw, 4 Y. & C. Exch. Rep. 506.

the lands are to vest in the promoters of the undertaking, upon a deed-poll being executed in the manner therein described.

*Investment of Compensation Money.*

By the 76th section, if the owner of lands, after an agreement for compensation, or an award in respect thereof, either refuses to convey or cannot make a title, or is absent from the kingdom, the purchase-money or compensation may be paid into the Bank in like manner.

Where owner of absolute interest refuses or cannot make out a title.

By the 77th section, upon such deposit as last aforesaid being made, a receipt is to be given, and the lands invested in the promoters of the undertaking, upon a deed-poll being executed.

*Purchase-money to be paid into the Bank.*

The 78th section enacts, that " Upon the application by petition of any party making claim to the money so deposited as last aforesaid, or any part thereof, or to the lands in respect whereof the same shall have been so deposited, or any part of such lands, or any interest in the same, the Court of Chancery may, in a summary way as to such Court shall seem fit, order such money to be laid out or invested in the public funds, or may order distribution, thereof, or payment of the dividends thereof according to the respective estates, titles, or interests of the parties making claim to such money or lands, or any part thereof, and may make such other order in the premises as to such Court shall seem fit."

*Who may apply for investment.*

By the 79th section, " If any question arise respecting the title to the lands in respect whereof such monies shall have been so paid or deposited as aforesaid, the parties respectively in possession of such lands as being the owners thereof, or in receipt of the rent of such lands being entitled thereto at the same time of such lands being purchased or taken, shall be deemed to have been lawfully entitled to such lands, until the contrary be shown to the satisfaction of the Court; and unless the contrary be shown as aforesaid, the parties so in possession, and all parties claiming under them, or consistently with their possession, shall be deemed entitled to the money so deposited, and to the dividends or interest of the annuities or securities purchased therewith, and the same shall be paid and applied accordingly " (i).

Where the title to the fund is disputed.

The 80th section enacts, that " In all cases of monies deposited in the Bank under the provisions of this or the special Act, or an Act incorporated therewith, except where such monies shall have been so deposited by reason of the wilful refusal of any party entitled thereto to receive the same, or to convey or release the lands in respect whereof the same shall be payable, or by reason of the

*Costs.*

(i) As to the power of the Court under the Act, see *ex parte, Issauchaud*, 3 Y. & C. Exch. Rep. 721.

Costs of Investment of Purchase money.

What costs to be paid by the companies.

Costs of one investment only in general allowed.

Costs of conveyances. &c.

willful neglect of any party to make out a good title to the land required, it shall be lawful for the Court of Chancery to order the costs of the following matters, including therein all reasonable charges and expenses incident thereto to be paid by the promoters of the undertaking; (that is to say,) the costs of the purchase or taking of the lands, or which shall have been incurred in consequence thereof, other than such costs as are herein otherwise provided for, and the costs of the investment of such monies in government or real securities (*k*), and of the re-investment thereof in the purchase of other lands, and also the costs of obtaining the proper orders (*l*) for any of the purposes aforesaid, and of the orders for the payment of the dividends (*m*) and interest of the securities upon which such monies shall be invested, or for the payment out of Court of the principal of such monies, or of the securities whereon the same shall be invested, and of all proceedings relating thereto, except such as are occasioned by litigation between adverse claimants: provided always that the costs of one application only for re-investment in land shall be allowed, unless it shall appear to the Court of Chancery that it is for the benefit of the parties interested in the said monies that the same should be invested in the purchase of lands in different sums and at different times, in which case it shall be lawful for the Court, if it think fit, to order the costs of any such investments to be paid by the promoters of the undertaking."

The 81st section regulates the form of the conveyances to be made under the Act, and their effect.

The 82nd section enacts, that "The costs of all such conveyances shall be borne by the promoters of the undertaking, and such costs shall include all charges and expenses incurred on the part as well of the seller as of the purchaser of all conveyances and assurances of any such lands, and of any outstanding terms or interests therein, and of deducing, evidencing, and verifying the title to such lands, terms, or interests (*n*), and of making out and furnishing such abstracts and attested copies as the promoters of the undertaking may require, and all other reasonable expenses incident to the investigation, deduction, and verification of such title."

(*k*) *Ex parte* The Bishop of Durham, 3 Exch. Rep. 690; *Ex parte* Onslow, 1 Y. & C. Exch. Rep. 553; *ex parte* Hirst, 4 Y. & C. Exch. Rep. 468.

(*l*) *Ex parte* Taylor, 1 Y. & C. Exch. Rep. 229.

(*m*) *Ex parte* Althorpe, 3 Y. & C. Exch. Rep. 396; *Mitchell v. Newell*, 3 Railway Cases, 515.

(*n*) *Ex parte* The Trustees of J. Addey's Charity, 3 Railway Cases, 119.

It was decided before this Act, (and it does not seem that the words of the Act have affected the decision,) that where a vendor, after contracting to sell land to a railway company, dies before executing the conveyance, and so devises his land as that a suit is necessary for the completion of the contract, the costs of such suit must be paid out of the purchase-money (o). Taxation of Costs.

By the 83rd section it is enacted, that "If the promoters of the undertaking, and the party entitled to any such costs (p), shall not agree as to the amount thereof, such costs shall be taxed by one of the taxing Masters of the Court of Chancery, upon an order of the same Court to be obtained upon petition in a summary way by either of the parties; and the promoters of the undertaking shall say what the said Master shall certify to be due in respect of such costs to the party entitled thereto, or in default thereof, the same may be recovered in the same way at any other costs payable under an order of the said Court, or the same may be recovered by distress in the manner hereinbefore provided in other cases of costs, and the expense of taxing such costs shall be borne by the promoters of the undertaking, unless, upon such taxation, one-sixth part of the amount of such costs shall be disallowed; in which case the costs of such taxation shall be borne by the party whose costs shall be so taxed, and the amount thereof shall be ascertained by the said Master and deducted by him accordingly in his certificate of such taxation."

#### SECTION V.

##### *Statutes relating to Solicitors.*

ANOTHER important branch of the statutory jurisdiction of the Court arises under the recent statute of the 6 & 7 Vict. c. 73, intitled "An Act for consolidating and amending several of the laws relating to Attornies and Solicitors practising in England and Wales." Before considering the practice under this Act, it is desirable to state the jurisdiction, which, independent of any Act of Parliament, the Court has always exercised over Solicitors. General jurisdiction over Solicitors.

(o) *Midland Counties Rail. Company v. Westcomb*, 11 Sim. 57; *Midland Counties Railway Company v. Valdecott*, *Railway Cases*, 2, p. 394; *Eastern Counties Railway Company v. Tuffnell*, *Railway Cases*, 3 p. 133.

(p) The Court has no jurisdiction upon a special agreement between the parties, ex parte *The Great Western Railway Company*, 3 *Railway Cases*, 516.

General Jurisdiction.

Former practice.

Division of the duties of the Six Clerks between Clerks of Records and Writs and Solicitors.

Summary jurisdiction over Solicitors.

General jurisdiction independent of statute.

Formerly, the sworn clerks appear to have been the only recognised agents of parties prosecuting causes in Chancery, but as the business of the Court increased, their number became insufficient to enable them to conduct throughout the suits of all the claimants. Consequently, the practice arose of confining the duty of the sworn clerks to the performance of a certain portion of the business in every suit, and the remainder was performed by Solicitors duly admitted as officers of the Court. Upon the recent abolition of the office of Six Clerks, and sworn clerks, the duties heretofore performed by them have been divided between the Clerks of Records and Writs and the Solicitors of the Court. The former body being intrusted with the custody of the Records of the Court, and generally with that part of the duties of the Six Clerks and sworn clerks in which they acted as confidential officers of the Court, whilst the Solicitors, in addition to their former duties, have now to perform such portions of the business of the sworn clerks as had reference more exclusively to the suitor, and was transacted by them as his agents. The Solicitors have always been considered and treated as authorized officers of the Court, and the manner of their admission is regulated by the statute above referred to. As a consequence of their position as officers of the Court, the Court has always exercised a summary jurisdiction over them.

Thus, if a Solicitor be guilty of gross professional misconduct, and the facts be established by affidavit, then the Court will, upon petition, order his name to be struck off the rolls (q) (1). More frequently, however, the summary jurisdiction of the Court has been put in force in cases where a party has applied for aid in gaining possession of deeds and documents retained by his Solicitor. In the case of *ex parte* The Earl of Uxbridge, a petition for this purpose was presented under the general jurisdiction of the Court over Solicitors, and Lord Eldon said "There was no doubt the Court exercised this jurisdiction long before the statute, which did little more than introduce the regulations under which the jurisdiction should be exercised" (r).

As in cases of this description the Court would not order the Solicitor to deliver up the deeds of his client without providing for the payment of what was due for professional charges to the So-

(g) *Atkyns*, 173; in *re Martin*, 6 *ker*, 6 *Sim.* 476; in *re Rice*, 2 *Keen*, *Beav.* 337. 181; in *re Murray*, 1 *Russ.* 519.

(r) 6 *Ves.* 426; see also in *re Bar-*

(1) If a deceit is practised by a solicitor, in his character as such, although not in a suit pending in the Court, he will be removed from his office as solicitor. *Matter of Peterson*, 3 *Paige*, 510.

licitor, the Court extended its summary jurisdiction by making orders upon petition for the delivery and taxation of the Solicitor's bill, and by putting the client making the application upon terms which ensured payment (s). General Jurisdiction.

Upon a similar principle, if a Solicitor retained money received by him in his character of Solicitor for the use of his client, his bill was taxable (t), though it contained no charges for business of such a kind as would have rendered it taxable under the provisions of any statute previous to the 6 & 7 Vic. c. 73. Where the application for taxation of a Solicitor's bill was not made until after payment, the Court used to exercise a discretionary power in determining whether such taxation should be ordered. The cases upon this subject are fully reviewed by Lord Cottenham in *Horlock v. Smith* (u), and in *Waters v. Taylor* (x); and from the judgment in those cases we deduce that it required a strong case to be made when a client applied for taxation of his Solicitor's bill after payment and due opportunity for investigating the items; but that the Court would give relief after any length of time if a case of fraud or improper conduct were proved against the Solicitor. It seems also, that when there was an application to open a Solicitor's bill upon the ground of improper charges, the respondent was as much entitled to have the particular items stated in the petition as a defendant to a bill filed for the purpose of opening a settled account is entitled to have the particular items on which the plaintiff intends to rely stated in the bill. Taxation of bill under general jurisdiction.  
After payment

It is impossible to state clearly the circumstances under which the Court will make orders for the delivery up by a Solicitor of the deeds of his client without first investigating the nature and extent of the lien which he possesses in respect of his bills for professional charges. This lien extends as well to deeds or documents of the client which may chance to be in the Solicitor's hands in the course of business, as to any fund recovered in a suit conducted by him. There is however, a material distinction between the lien upon a fund realized in a cause, and the lien which a Solicitor has upon papers deposited in his hands by a client. The lien upon such a fund extends only to the costs of the particular suit under which the fund arises; but to this limited extent the Solicitor is entitled actively to enforce it; whereas the right of a Solicitor to retain possession of the deeds and papers Lien of Solicitors.  
Distinction between lien upon papers and lien on a fund.

(s) In re Chilcote, 1 Beav. 421. 157; and *Dagley v. Kentish*, 2 B. & Adol. 411.  
(t) In re Barker, 6 Simon, 476, and see *Wilson v. Gutteridge*, 3 B. & C. (u) 2 M. & C. 510.  
(x) 2 M. & C. 526.



Lien of Solicitor upon Papers.



Effect of lien upon papers.

Exists against all parties claiming under the client.

Lien against third parties does not extend to costs incurred after transfer.

Lien how created.

of a client extends to all professional costs (*y*), but cannot be actively enforced (*z*). The lien of a Solicitor exists only between the Solicitor on the one side, and the client, or persons claiming under him, on the other; it is not allowed to prejudice the rights or equities of the persons claiming adversely and paramount to the client (*a*).

As a general rule, where the Solicitor has once acquired a lien upon the papers of his client, no third party claiming under the client can interfere with the right of detention; possession may be kept of the papers until they are redeemed by the full payment of the sum in respect of which the lien exists. Thus, in *Warburton v. Edge* (*b*), a Solicitor had been employed by an administratrix in the management of the intestate's estate, and also in a suit instituted against her by a creditor of the deceased; the creditor obtained a decree and presented a petition for reference to ascertain whether the Solicitor had a lien upon certain papers, and for an order that he might deliver them up to the receiver. The V. C. of England dismissed the petition, saying, that "It appeared to him that there was other business done by the Solicitor for the administratrix in the administration, and for the protection of the estate; therefore, he must have a lien upon the deeds prior to the right of the administratrix to take them out of his hands, and consequently prior to the right of the plaintiffs, who were merely general creditors on the deceased's estate, and who therefore could only take the estate as they found it."

Although, however, the lien of a Solicitor will, in general, prevail against persons claiming under the client, yet it seems that where a client has transferred either wholly or partially his interest in the estate to which the papers relate, the Solicitor will only be able to claim a lien as against the person to whom the estate is so transferred to the extent of the sum which was due to the Solicitor at the time of the transfer. Thus Lord Chancellor Sugden has decided, that a Solicitor could only claim as against a judgment creditor of his client a lien upon the deeds of his estate for the amount of costs incurred prior to the *rendition of the judgment* (*y*).

For the purpose of creating the lien, all that is necessary is, that the papers should come into the hands of the Solicitor in the

(*y*) *Ex parte Sterling*, 16 Ves. 258; *ex parte Pemberton*, 18 Ves. 282; *Worrall v. Johnson*, 2 J. & W. 218. (*z*) *Bozon v. Bolland*, 4 My. & Cr. 358.

(*a*) *Baker v. Henderson*, 4 Sim. 27; *Bell v. Taylor*, 8 Sim. 216. (*b*) 9 Sim. 508. (*y*) *Blunden v. Desart*, 2 Dr. & W. 405.

course of his professional business; if the intention is to deposit papers for a particular purpose, and not to be subject to the general lien, that must be by special agreement (z). Lien upon Papers.

It is necessary, however, that they should have come into his hands in his professional character; for, if they came to him in any other capacity, as, for instance, in that of steward of a manor, he will have no lien upon them (a).

It has been before stated, that the lien upon papers is not one which can be actively enforced; it consists simply in a right to retain papers until absolute payment of the Solicitor's costs. Some doubt has been thrown upon the strict right to retain the papers until absolute payment, by an expression of Lord Eldon, that "Where a party has a pressing necessity for papers, the Court will order them to be delivered over upon a deposit being made, which will cover not only what is due upon the bill, but what may be due for the costs of the taxation" (b). Right to retain papers till absolute payment.

In *Postlethwaite v. Blythe* (c), Lord Eldon however states it to be "Contrary to the whole course of proceeding in this Court to compel a creditor to part with his security till he has received his money. Nothing but consent can authorize me to take the estate from the plaintiff before payment." The expression above quoted was used with reference to a mortgage; but, according to Lord Cottenham, the rule applies equally to the case of the lien of a Solicitor, so that as matter of strict right, a Solicitor may retain possession of documents in his possession until absolute payment to himself; and the Court will not, without his consent, make an order for the delivery of them up, even upon ample security for the payment of his demand being brought into Court (d). It appears, however, that if the withholding of the document would occasion the loss of the property itself, the Court will make a special order to prevent the lien having that effect (e). Where retention would cause a loss of the property itself.

This right however of the Solicitor to refuse production of documents deposited with him until his bill is paid, will not be allowed to prevail when the relation of Solicitor and client has been terminated by any act of the Solicitor himself, though it is otherwise where the Solicitor is discharged by his client or his representatives (f). In a case where the Solicitor discharges Where Solicitor discharges himself.

(z) *Ex parte Sterling*, 16 Ves. 258.

(a) *Champernown v. Scott*, 6 Mad.

13.

(b) *Clutton v. Pardon*, T. & R. 104; see also *Mills v. Finlay*, 1 Beav.

160.

(c) 2 Swan. 256.

(d) *Richards v. Playtel*, 1 C. & P.

79. Formerly it seems that although a Solicitor could retain possession of deeds, yet he could be compelled to produce them for inspection. *Ross v. Laughton*, 1 V. & B. 349.

(e) *Richards v. Playtel*, ubi supra.

(f) *Lord v. Wormleighton*, Jacob, 580.

Effect upon  
Lien of  
Discharge.

Practice when  
the solicitor  
discharges  
himself.

himself, whether he does it directly, or does some act amounting indirectly to a discharge, a different rule prevails, materially qualifying the right of retention; thus in the case of *Colegrave v. Manley* (*g*), where the plaintiff's Solicitor, by assigning over the business to another, discharged himself, Lord Eldon ordered him, though his bills of costs were not paid, to deliver up the papers to the new Solicitor of the party, the latter undertaking to hold them subject to the former Solicitor's lien, for what should be found due to him on the taxation of the bills. It is true, that in several preceding cases where the Solicitor had discharged himself, orders were made giving to the client the right of inspection only (*h*); but Lord Cottenham, in *Heslod v. Metcalfe* (*i*), has followed the decision of Lord Eldon in *Colegrave v. Manley*, considering it to have been made by him after a full consideration of the preceding cases; consequently, the practice (*k*) may be considered to be settled in accordance with that case.

Where a party has employed as his Solicitors in a cause, a firm of two Solicitors in partnership, the retirement from the business of one of them operates as a discharge, and Sir James Wigram, in *Griffiths v. Griffiths* (*l*), held that the client is thereupon entitled to require that the papers necessary for the prosecution of the cause should be delivered up to his new solicitor upon the usual undertaking for saving the lien of the discharged solicitors.

Lien of personal representatives of solicitors.

It does not seem very clear what is the extent of the lien of the personal representative of a deceased solicitor in a case where the relation between the client and his solicitor has not been terminated either by the solicitor discharging himself, or by the client discharging the solicitor, but where it has come to an end by the death of the solicitor. In the case of *Redfern v. Sowerby* (*m*), Lord Eldon refused to order the personal representative of a deceased solicitor to deliver the papers in the cause to another solicitor without payment or security for payment of the solicitor's bill.

Lien of town agents.

It appears from the case of *Bray v. Hine* (*n*), that the town agents of a country solicitor have a lien upon all the papers deposited in their hands, and that they are entitled to retain the papers in any particular cause or matter, until payment to them of the

(*g*) Turn. & Russ. 400.

(*h*) *Moir v. Mudie*, 1 Sim. & St. 282; *Commerell v. Poynton*, 1 Swanston, 1.

(*i*) 3 M. & C. 187.

(*k*) *Cane v. Martin*, 2 Beav. 584; in which case, in addition to the usual

undertaking, the new Solicitor was ordered to undertake to prosecute the suit with due diligence.

(*l*) 2 Hare, 587.

(*m*) 1 Swanston, 84.

(*n*) 6 Price, 203.

um due from the owner of the papers, to the country solicitor. <sup>Lien upon Fund in Court.</sup> When such payment has been made, the town agents may then set the sum which they have received off against the general debt due to them from the country solicitor.

The lien of a solicitor upon the fund recovered in a cause, does <sup>Lien upon fund in Court.</sup> not extend beyond the costs of that particular suit (o). And even though the fund in Court be recovered by means of a deed, upon which he has a general lien, yet his claim upon the money, the fruits of the deed, is not allowed to extend to general professional charges (p). Where the fund recovered in the cause consists of trust property, and the solicitor is retained only by the trustees, <sup>When trust</sup> it does not appear that he has any lien upon the fund, as against <sup>property.</sup> the *cestui que trusts* (q). So, also, if retained by some of the *cestui que trusts*, he has no lien against the share of any parties, other than those by whom he has been retained (r). It frequently happens that a decree directs mutual payments between the parties to the cause. In such a case, the lien of the solicitor does not extend to all sums coming to the credit of his client, but only to the ultimate balance to be paid to him in the suit (r) (1).

The lien, however, upon a fund, differs from that upon papers, <sup>Or attaches only upon balance in the Court.</sup> in that it may be actively enforced. Thus, if a sum of money be declared by decree or judgment to be due from one party to another, the solicitor for the party to receive, may give notice of his lien to the party to pay the money (s); and if the notice be <sup>How enforced</sup> disregarded, such party is liable to pay the money a second time to the solicitor (2). So, also, when the fund coming to his client

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|----------------------------------------------|--------------------------------------------|
| (o) <i>Laan v. Church</i> , 4 Madd. 391.     | (r) <i>Bawtree v. Watson</i> , 2 Keen,     |
| (p) <i>Bozon v. Bolland</i> , 4 M. & C. 713. |                                            |
| 354, overruling <i>Worrall v. Johnson</i> ,  | (s) <i>Cowell v. Simpson</i> , 16 Ves.     |
| 2 Jac. & W. 214.                             | 281. See also <i>Howell v. Harding</i> , 8 |
| (q) <i>Worrall v. Harford</i> , 8 Ves. 4.    | East, 362; <i>Nicholson v. Norton</i> , 7  |
| (r) <i>Hall v. Laver</i> , 1 Hare, 577.      | Beav. 67.                                  |

(1) The solicitor's lien is only on the clear balance due to his client after all the equities arising out of that particular litigation are settled. But a party against whom a decree for costs has been made, will not be permitted to set off against such costs a decree or judgment in his favor in relation to a distinct matter, to the prejudice of the solicitor's lien. *Dunkin v. Vandenberg*, 1 Paige, 622.

The lien of an attorney, for his costs of the suit, is paramount to the claim of the adverse party, to set off a judgment recovered against the client in another suit. *Gridley v. Garrison*, 4 Paige, 647.

(2) *Watson v. Depeyster*, 1 Caines, 67, note (a); *Pinder v. Morris*, 3 Caines, 165; *Martin v. Hawkes*, 15 John. 407; *People v. N. York Common Pleas*, 13 Wendell, 349; *Ten Broeck*, 10 Wendell, 617.

Where the parties to a suit make a collusive settlement thereof, before a decree, for the purpose of defrauding the solicitor of his costs, his remedy is to proceed with the suit, in the name of his client, notwithstanding the collusive settlement. *Talcott v. Bronson*, 4 Paige, 501.

Lien upon  
Fund in Court.

Costs not sub-  
ject of bill of  
account.

Effect of Stat.  
6 & 7 Vic. c.  
73.

Power to re-  
fer bills,  
whether rela-  
ting to Court  
business or  
not.

is in Court, the solicitor may present a petition for the taxation of his bill, and for payment of it out of the fund.

A solicitor cannot file a bill in equity for an account, in respect of his bill of costs. In the case of *Allison v. Herring* (*t*), a demurrer to such a bill was allowed, the V. C. of England observing that there was no representation that the solicitors received any monies as agent for, or on account of their clients, but only on account of their bill of costs.

If any security has been taken by a solicitor from his client, in any way inconsistent with the nature of the contract created by the lien, the lien seems to be altogether destroyed. Thus a special agreement to give credit for three years, on condition of receiving interest, had the effect of forfeiting the lien (*u*). And it is settled that there exists no jurisdiction in the Court upon petitions presented in a summary manner by clients against their solicitors, to give relief founded upon any special agreement (*x*).

We shall now proceed to consider the Act of 6 & 7 Vic. c. 73, by the 37th section of which statute it is enacted, that attorneys and solicitors shall not commence an action for fees till one month after they have signed (*y*) and delivered in their bills in manner therein particularly mentioned. "Upon the application of the party chargeable by such bill within such month, it shall be lawful, in case the business contained in such bill, or any part thereof, shall have been transacted in the High Court of Chancery, or in any other Court of Equity, or in any matter of bankruptcy or lunacy, or in case no part of such business shall have been transacted in any other Court of Law or Equity (*z*) for the Lord High Chancellor, or the Master of the Rolls, and in case any part of such business shall have been transacted in any other Court, for the Courts of Queen's Bench, Common Pleas, Exchequer Court of Common Pleas at Lancaster, or Court of Pleas at Durham, or any judge of either of them; and they are hereby respectively required to refer such bill, and the demand of such attorney or solicitor, executor, administrator, or assignee (*a*), thereupon to be taxed and settled by the proper officer of the Court in which such reference shall be made, without any money being brought into Court."

(*t*) 9 Sim. 588; but see *Fyson v. Pole*, 3 Y. & C. Exch. Rep. 266.

(*u*) *Cowell v. Simpson*, 16 Ves. 282.

(*z*) *Alexander v. Anderdon*, 6 Beav. 406; see ante, p. 2129, note (*p*).

(*y*) Taxation may be ordered of a bill, even though it has not been

signed, in re *Pender*, 9 Jurist, 339.

(*z*) For the meaning of this expression see in re *Gaitskell*, 9 Jurist, 909.

(*a*) The Court has not, under this Act, any power to tax the bill of an agent, in re *Gedge*, 9 Jurist, 470; *Simons v. Peacock*, 9 Jurist, 711.

"And the Court or judge making such reference, shall restrain such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference."

Reference of Bill for Taxation.

Power to restrain action pending the reference.

"And in case no such application as aforesaid shall be made within such month, then it shall be lawful for such reference to be made as aforesaid, either upon the application of the attorney or solicitor, or the executor, administrator, or assignee of the attorney or solicitor, whose bill may have been so delivered, sent, or left, or upon the application of the party chargeable by such bill, with such directions and subject to such conditions as the Court making such reference shall think proper; and such Court or judge may restrain such attorney, solicitor, or the executor, administrator, or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand, pending such reference upon such terms as shall be thought proper."

Taxation after one month from delivery.

Upon such terms as Court thinks proper.

There is also a proviso, "That no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained, or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent, or left as aforesaid, except under special circumstances, to be proved to the satisfaction of the Court to which the application for such reference shall be made."

No taxation after twelve months or after verdict except under special circumstances.

There is also another power to the effect that the Court may, in the same cases in which it is authorized to refer any bill which has been delivered, make such order for the delivery by any solicitor, or the executor, administrator, or assignee of any solicitor, of his bill, and for the rendering up of deeds, documents, or papers in his possession, or otherwise touching the same, in the same manner as has heretofore been done by the Court where any business has been transacted, in which such order was made (b).

Power to order delivering up of papers, &c.

It will be observed, that, under the preceding section, no person is at liberty to apply for taxation except the party chargeable; but under the 38th section, the same rights in all respects are conferred upon any person (not the party chargeable) who "shall be liable to pay, or shall have paid such bill either to the attorney or

Person liable to pay or who shall have paid.

(b) When a solicitor has other papers belonging to the client in addition to those relating to the bill delivered. See in re Pardon, 9 Jurist, 838.

such attorney or solicitor (*d*), executor, administrator, or assignee of such attorney or solicitor had." Application of  
Persons not  
chargeable.

Where a bill has been paid, the Act does not seem under any circumstances, to enable parties claiming under the person who has paid it to apply, as for instance, his assignees in bankruptcy or insolvency (*e*).

By the 40th section, it is enacted, "That for the purpose of any such reference upon the application of the person not being the party chargeable within the meaning of the provisions of this Act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such Court or judge to order any such attorney or solicitor, or the executor, administrator, or assignee or such attorney or solicitor, to deliver to the party making such application, a copy of such bill upon payment of the costs of such copy." And it is also provided, "That no bill which shall have been previously taxed and settled, shall be again referred unless under special circumstances."

By the 40th section, it is enacted, "That for the purpose of any such reference upon the application of the person not being the party chargeable within the meaning of the provisions of this Act as aforesaid, or of a party interested as aforesaid, it shall be lawful for such Court or judge to order any such attorney or solicitor, or the executor, administrator, or assignee or such attorney or solicitor, to deliver to the party making such application, a copy of such bill upon payment of the costs of such copy." And it is also provided, "That no bill which shall have been previously taxed and settled, shall be again referred unless under special circumstances."

The 41st section enacts, "That the payment of any such bill as aforesaid, shall in no case preclude the Court or judge to whom such application is made, from referring such bill for taxation if the special circumstances of the case shall, in the opinion of such Court or judge, appear to require the same upon such terms and conditions, and subject to such directions as to such Court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

From the case of *in re Downes* (*f*), it appears that in no case can the Court order a bill to be taxed as against the solicitor himself, if twelve calendar months have elapsed after the payment.

But if a trustee or executor has paid a solicitor's bill improperly, and has neglected to procure the bill to be taxed in due time, there appears to be nothing in this Act to prevent the Court (when called upon, to disallow the whole or a part of a payment alleged to have been made by a trustee or executor) from ascertaining by taxation, if necessary, what is a proper sum to be allowed to the trustee or executor for his payment (*g*).

Any of the parties entitled to apply within the meaning of this Act may obtain, as of course, within a month after the delivery of a signed bill, an order for its taxation; and if no bill has been delivered, may likewise, as of course, obtain an order for the de-

(*d*) *In re Downes*, 5 Beav. 425. (*g*) *In re Downes*, 5 Beav. 429;  
(*e*) *In re Becke & Flower*, 5 Beav. 410. and see *Hazard v. Lane*, 3 Mer. 291;  
*Grove v. Sansom*, 1 Beav. 297.  
(*f*) 5 Beav. 425.

Proceedings  
under the Act.

livery of a bill within a month and for its taxation. If the solicitor does not comply with this order by delivering the bill within the proper time, he will be considered as having discharged himself (*h*), and will be ordered to deliver the papers and documents in his possession relating to the suit (without prejudice to his lien) to the new solicitor (*i*).

When the  
month has ex-  
pired, order  
how obtained.

The order must be endorsed in accordance with the provisions of the 12th Order of August, 1841 (*k*). When made in a cause against a person, not a party thereto, it may be enforced by writ of attachment (*l*); but when made upon petition without suit, the 12th Order of August, 1841, may be held not to apply, in which case the order will have to be enforced under the old practice, by motion that the disobedient party may stand committed (*m*). When a month has expired after delivery of the bill, or when it has been paid, no order, as of course, for its taxation, can be obtained; and although the party may be entitled to an order upon the merits, yet the fact of its having been made, as of course, is a sufficient reason for its discharge (*n*).

Application to  
costs incurred  
before the Act.

With respect to the application of the Act to business, which occurred previous to the time of its enactment, the rule is, that the statute applies to such bills as were delivered before the Act was passed, and were taxable under the law then existing, and that the payment of a previously taxable bill before the Act came into operation, does not preclude taxation under the Act upon a proper application made in due time. But that the payment of a bill which was not taxable as the law stood before the Act, does preclude any order for taxation under the Act (*o*).

How period of  
twelve months  
is calculated.

As the 41st section precludes any taxation twelve months after payment, it becomes important to consider the precise limits between which this period of twelve months is to be calculated. In the case of *Sayer v. Wagstaff* (*p*), Lord Langdale decided that when the bill was paid by a promissory note, which, when it became due, was honored and paid, the time runs in the absence of any special circumstances, from the period when the promissory note was honored and paid, and not from the time when it was given. And he also decided that an application within the mean-

(*h*) See page 2134.

(*i*) *Cooper v. Hewson*, 2 Y. & C. 515.

(*k*) Ante, p. 1250.

(*l*) *Lane v. Oliver*, 2 Hare, 97.

(*m*) In re Beech, 4 Mad. 128. Lord Langdale, M. R., expressed an opinion that this practice should in such a case be adopted, in re Phelps, 10th

Dec. 1845, ex relatione Mr. Rogers, Reg. Office.

(*n*) *Harris v. Stark*, 4 M. & C. 261; in re Becke & Flower, 5 Beav. 409.

(*o*) In re Lees, 5 Beav. 410.

(*p*) 5 Beav. 415; [*Blake v. Young*, 10 Jurist, 68.]



ing of the Act, must be considered as made at the latest, when the order appointing the time for hearing the petition is signed. Proceedings under the Act.

All petitions under the Act must be entitled in the matter of such attorney or solicitor (*p*); and in cases where the order can only be made under special circumstances, that is, where the bill has either been delivered twelve months, or where it has been paid before application, the petition must state the special circumstances relied upon to induce the Court to make the order. From the case of *in re Thompson* (*q*), it seems that in all cases where a petition is presented under special circumstances, there must be a statement of some of the specific items objected to, in addition to a statement of the special circumstances upon which the petitioner relies. If overcharges constitute the only special ground for taxation, evidence of their impropriety should be given in support of the petition. Form of petitions.

Where bills of costs have been delivered as well for business done for the client personally, as also for business done for him in a representative character, the proper course is, to obtain two separate orders for their taxation (*r*).

The business contained in a taxable bill, may be business of which no part was transacted in any Court of Law or Equity, but it must be business connected with the profession of an attorney or solicitor, and consequently the fees of the steward of a manor are not taxable under the 6th & 7th Vict. c. 73 (*s*). It is laid down that a party may, under a common order for taxation, object, on the ground of want of retainer, to any items except those as to which he has admitted the retainer by his petition (*t*). Under the common order for the taxation of costs, the Master is not authorized to take an account of pecuniary matters between the parties, which are foreign to the bill of costs, but it is otherwise where monies are paid by the client on account of the bill of costs, or where by agreement between the solicitor and client, the monies which come to the hands of the solicitor are to be applicable to the payment of his bill (*u*). Where the attorney of one of the parties in a cause referred to arbitration, employed another attorney to attend before the arbitrator in his stead, Mr. Justice Patte-

(*p*) 43rd section, and see in *re Thomas Hare*, 8 Jurist, 577, as to manner in which affidavits should be entitled.

(*q*) 9 Jurist, 109; *Anon.* 9 Jurist, 512, this case should be, *ex parte Bennett*; and see in *re Wells*, 9 Jur. 320; see however *ex parte Wilkinson*, 2 Col. 92.

(*r*) *In re Pender*, 9 Jurist, 338.

(*s*) *Allen v. Aldridge*, 5 Beav. 406; *in re Barber*, 9 Jurist, 976.

(*t*) *In re Bracey*, 9 Jurist, 417.

(*u*) *Jones v. James*, 1 Beav. 307. See also *Waring v. Williams*, 2 Beav. 1.

**Taxation of  
Costs of Re-  
ference.**

**Power to tax  
*ex parte*.**

**Costs of taxa-  
tion.**

**Power in tax-  
ing officer to  
certify spe-  
cially.**

son held that it was not an attorney's business, but an advocate's, and said, "An employment of one attorney by another to advocate his client's interest is not business of such a nature as to enable the Court to refer to taxation a bill of costs in respect of it" (z).

With respect to the mode of taxation, the 37th section directs that "Upon every such reference, if either the attorney, solicitor, or executor, administrator, or assignee of the attorney or solicitor whose bill shall have been delivered, sent, or left, or the party chargeable with such bill, having due notice, shall refuse or neglect to allow such taxation, the officer to whom such reference shall be made, may proceed to tax and settle such bill or demand *ex parte*."

With respect to the costs of taxation, the 37th section directs that, "In case any such reference as aforesaid shall be made upon the application of the party chargeable with such bill, or upon the application of such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, and the party chargeable with such bill shall attend upon such taxation, the costs of such reference shall, except as hereinafter provided for, be paid according to the event of such taxation; that is to say, if such bill when taxed be less by a sixth part than the bill delivered, sent, or left, then such attorney or solicitor, or executor, administrator, or assignee, of such attorney or solicitor, shall pay such costs; and if such bill when taxed shall not be less by a sixth part than the bill delivered, sent, or left, then the party chargeable with such bill, making such application, or so attending, shall pay such costs; and every order to be made for such reference as aforesaid, shall direct the officer to whom such reference shall be made, to tax such costs of such reference, to be so paid as aforesaid, and to certify what, upon such reference, shall be found to be due to or from such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill and demand, and of the costs of such reference if payable (y).

"Provided, also, that such officer shall, in all cases, be at liberty to certify specially any circumstances relating to such bill or taxation; and the Court or judge shall be at liberty to make thereupon any such order as such Court or judge may think right respecting the payment of the costs of such taxation (z).

(z) In re Simmonds, 9 Jurist, 227.

(y) As to costs when bill was taxed before the statute, see *Hodges v. Bird*, 8 Jurist, 317.

(z) It seems that unless the Officer

reports specially, the Court has no power to direct the costs to be paid otherwise than under the Act, in re Woollet, 8 Jurist, 130.

"Provided, also, that where such reference as aforesaid shall be made when the same is not authorized to be made, except under special circumstances, as hereinbefore provided, then the said Court or judge shall be at liberty, if it shall be thought fit, to give any special directions relative to the costs of such reference." It seems that where there has been any thing in the nature of a special contract between the solicitor and the client concerning costs, the Court has no jurisdiction under the Act to decide upon the effect of such a contract (a).

Costs on Taxation.

Power of Court to give special directions.

# SECTION VI.

## Miscellaneous Statutes.

THE 6 Anne, c. 18, intituled "An Act for the more effectual discovery of the death of persons pretended to be alive to the prejudice of those who claim estates after their deaths," enacts, to the effect that a person entitled in reversion to an estate after the death of an infant, married woman, or any other person whatsoever, may, upon affidavit of his title, and that he hath cause to believe such infant, married woman, or other person is dead, and that such death is concealed by any guardian, trustee, husband, or other person, once a year, if he shall think fit, move the Lord Chancellor to order such guardian, trustee, husband, or other person, at such a time and place as the Court shall direct on service of such order to show to such persons as shall in such order be named, such infant, married woman, or other person, and upon default, the Court is authorized to order such guardian, trustee, husband, or other person, to produce such person in the Court of Chancery, or otherwise before commissioners to be appointed by the Court, at such time and place as the Court shall direct; and upon default of compliance with this order, "whereof return shall be made by the said commissioners, and that return filed in the Petty Bag Office," the *cestui que vie* is taken to be dead, and the reversioner may enter upon such lands, tenements, and hereditaments, as if such *cestui que vie* were actually dead.

Act for the production of the tenant for life on behalf of the reversioner.

A recent case occurred upon this statute in which a person entitled to certain property in reversion expectant on the determination of a lease thereof *pur autre vie* obtained an order for the produc-

Form of the orders.

(a) *Alexander v. Anderdon*, 6 Beav. 405; in *re Thompson*, 9 Jurist, 169.

Act for Pro-  
duction of  
Tenant for  
Life.

tion of the *cestui que vie* by the lessee to order at the church door of the parish on between the hours of 10 and 12 in the forenoon. The defendant appeared, and was served with the order, but did not produce the *cestui que vie*. The plaintiff appeared by affidavit, and by the return to whom the *cestui que vie* was ordered. Upon another order was obtained, commanding the *cestui que vie* at the bar of the Court, at 10 o'clock in the morning, which order was disobeyed as well as occurred as to whether some return to be made into the Petty Bag Office before the versioner to enter upon the demised premises, but the V. C. of England ruled that "The Registrar should insert a minute of the proceedings of the Court, that on that day at 10 o'clock in the morning, no return of the *cestui que vie* was produced or a return was made, and makes no provision as to costs, and, on appeal, the Court has decided that he had no jurisdiction in the matter concerning them (1).

Act for facilitating awards.

By the 9th & 10th Will. III, c. 15, introducing differences by arbitration," powers are given to persons desirous of settling their controversies by arbitration, that their submission of the suit to the arbitrators should be made a rule of any Court of record.

Proceedings under the Act.

When under this Act it is intended that a submission to arbitration should be made an order of the Court should be given; if then the opposite party does not comply with the order, the Court makes the order upon the production of the notice of motion, and a return of the agreement. If, however, the party liberty to apply to the Court without notice, it is unnecessary to serve a notice of motion, and the order may be made upon an *ex parte* application, supported by the return of the agreement. If the order is drawn up on the production of the agreement.

(k) In re Lingen, 12 Sim. 104; the following cases have also occurred under the Act; *ex parte Lennard*, M. R., 24th January, 1708, Reg. Lib. B. f. 145; *ex parte Child*, Reg. Lib. A. 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1826, 1827, 1828, 1829, 1830, 1831, 1832, 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864, 1865, 1866, 1867, 1868, 1869, 1870, 1871, 1872, 1873, 1874, 1875, 1876, 1877, 1878, 1879, 1880, 1881, 1882, 1883, 1884, 1885, 1886, 1887, 1888, 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2885, 2886, 2887, 2888, 2889, 2890, 2891, 2892, 2893, 2894, 2895, 2896, 2897, 2898, 2899, 2900, 2901, 2902, 2903, 2904, 2905, 2906, 2907, 2908, 2909, 2910, 2911, 2912, 2913, 2914, 2915, 2916, 2917, 2918, 2919, 2920, 2921, 2922, 2923, 2924, 2925, 2926, 2927, 2928, 2929, 2930, 2931, 2932, 2933, 2934, 2935, 2936, 2937, 2938, 2939, 2940, 2941, 2942, 2943, 2944, 2945, 2946, 2947, 2948, 2949, 2950, 2951, 2952, 2953, 2954, 2955, 2956, 2957, 2958, 2959, 2960, 2961, 2962, 2963, 2964, 2965, 2966, 2967, 2968, 2969, 2970, 2971, 2972, 2973, 2974, 2975, 2976, 2977, 2978, 2979, 2980, 2981, 2982, 2983, 2984, 2985, 2986, 2987, 2988, 2989, 2990, 2991, 2992, 2993, 2994, 2995, 2996, 2997, 2998, 2999, 3000, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 3011, 3012, 3013, 3014, 3015, 3016, 3017, 3018, 3019, 3020, 3021, 3022, 3023, 3024, 3025, 3026, 3027, 3028, 3029, 3030, 3031, 3032, 3033, 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3049, 3050, 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which case neither an affidavit of service, nor of due execution, is required. The order directs that the agreement to refer to arbitration be made an order of Court, to be observed and performed by the parties thereto, according to the true meaning thereof. The articles of agreement and the award are filed in the Report Office, from whence the parties can procure office copies.

Legacy Duty Act.

By the stat. 36 Edw. III. c. 52, intituled "An Act for repealing certain duties on legacies and shares of estates, and for granting other duties thereon, in certain cases," powers are given in the 32nd section to personal representatives, enabling them to pay into Court legacies due to persons absent beyond the seas, or in a state of infancy. The same section provides for the investment of the legacies so paid in the Three per cents, and empowers the Court of Chancery to deal with the produce upon petition in a summary manner.

Legacy Duty Act.

Under this Act, no order from the Court is requisite for the payment into Court of a legacy in cash; but if the legacy is in stock, the Accountant-general will not receive it without an order, which the V. C. of England considers that the Court can make within the spirit of the Act (a). The executor will be allowed to retain his costs out of the interest and pay in the balance (b).

Practice under the Act.

The 42 Geo. III. c. 116, the Land Tax Redemption Act, enacts in the 58th section to the effect, that where any trusts mortgages, or incumbrances, equally affect lands, part whereof shall be proposed to be sold for redeeming the land tax thereon, the Court of Chancery in England and of Sessions in Scotland may order such part to be conveyed to the purchaser discharged from incumbrances affecting the whole of the lands.

Land Tax Redemption Act

The 60th section enacts, "That it shall be lawful for any person or persons (not being respectively bodies politic, or corporate, or companies, or feoffees, or trustees for charitable or other public purposes, and not holding under any grant from the Crown, or any Act of Parliament as hereinafter is mentioned), who are or shall be seized of, or beneficially entitled to, any manors in England, of which any copyhold or customary estates shall be holden, with the approbation of the Court of Chancery, to be

Power upon petition of lord of manor to enfranchise.

(a) Ex parte *Monro*, 21 July, 1842. July, 1842; ex parte *Lumsden*, V.C.  
(b) Ex parte *Campbell*, M. R. 15 Wigram, 29 July, 1842.

of the widow and personal representatives of the survivor, order the stock to be transferred into her name, or into the names of the two deceased persons, but directed the Master to inquire who was entitled to the stock, with liberty to state special circumstances.

Act to make further provision as to Unclaimed Stock.

The costs are ordered to be paid out of the fund claimed (p); and in a recent case which Sir J. L. Knight Bruce, V. C., directed to be mentioned to the Lord Chancellor, Lord Lyndhurst directed them to be so paid (q). It should be added, that in the last session, an Act was passed, 8 & 9 Vict. c. 62, intituled "An Act to make further provision as to stock and dividends unclaimed," whereby, provision is made for the investment of the dividends accruing on the stock after the transfer to the Commissioners for the Reduction of the National Debt, and for giving notice, by advertisement, of the claim made by any person to any stock which has been so transferred to the said Commissioners.

Costs in general out of the fund.

Act to make further provisions as to stock and unclaimed dividends.

By the 33rd section of 3 & 4 Will. IV. c. 74, intituled "An Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance," if any person, protector of a settlement, is lunatic, idiot, or of unsound mind, whether so found by inquisition or not, the Lord Chancellor, or the person entrusted with the care of lunatics, is protector of such settlement in his place.

Fines and Recoveries Act.

Lord Chancellor protector of settlement in place of lunatic.

By the same section, "If any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement, shall be protector and shall be an infant; or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid; or if any settler entailing lands shall, in the settlement by which the lands shall be entailed, declare that the person, who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a set-

Court of Chancery when protector of settlement.

(p) *Ex parte Martin*, 1 Jac. 55.

(q) *Ex parte Holland*, 1 Ph. 379.

**Fines and Recoveries Act.**

tlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands."

**When lunatic tenant in tail in possession.**

It appears that where a lunatic is a tenant in tail in possession, no jurisdiction is conferred upon the Lord Chancellor by this Act (*q*).

By the 48th section, when "The Lord Chancellor in lunacy, or the High Court of Chancery shall be the protector of a settlement, power is given, on the motion or petition in a summary way by a tenant in tail under a settlement, to consent to a disposition under the Act by such tenant in tail, and the Lord Chancellor in lunacy, or the Court of Chancery, as the case may be, may make such order in the matter as shall be thought necessary."

**When lunatic tenant for life, and petitioner his son tenant in tail.**

**Form of reference.**

An order under these sections was made by Lord Brougham (*r*), when the lunatic was tenant for life, and the petitioner, his eldest son was *quasi* tenant in tail in remainder. A reference was made first to the Master, to inquire whether, under the limitations in the settlement, the stock in question was subject to be laid out in the purchase of land, and upon what uses, and who would be entitled thereto if such purchase were made, and whether the lunatic was the person who, if he were of sound mind, would be the protector of the settlement within the meaning of the Act. The Court, upon the Master's report, directed the stock to be sold, and the produce to be paid to the committee, to be applied in the advancement of the petitioner in the army, and that the petitioner's allowance out of his father's estate should be reduced to the extent of the dividends on the stock ordered to be sold.

**Principles of the Court in exercising the power of protector of settlement.**

Lord Cottenham had, in *re Newman* (*s*), to consider the principles by which the Lord Chancellor, when protector of a settlement in the place of a lunatic, will be guided in giving or withholding his consent to a deed of disposition under the Act. He observed that "The only duty of the Court is to see what with reference to the interests of the family it would be proper for the tenant for life to do, and the object must be rather to protect the

(*q*) In *re Blewett*, 3 My. & K. 250; see also the matter of Isaac Wood, 3 My. & Cr. 266.

(*r*) *Grant v. Yea*, 3 My. & K. 245.  
(*s*) 2 My. & Cr. 112.

jects of the settlement than to give any benefit to one member of the family to the exclusion of the others." And he also stated, at Lord Brougham seems to have "consented where the intention was to provide for the immediate family of the lunatic, but declined to consent where the object was to give a benefit to one member of the family at the expense of the others."

Irish Mortgage Act.

In the case in re Wainewright (t), the question was, whether the Court of Chancery was the protector of a settlement where the tenant for life was a married woman whose husband had been convicted of felony, and the life estate was not settled to her separately, the V. C. of England came to the conclusion, that "In order to constitute the Court of Chancery the protector, both the husband and wife must be convicted of felony." On appeal, however, Lord Lyndhurst came to a different conclusion, holding, that under the above stated circumstances the Court of Chancery was the protector of the settlement (u).

When married woman tenant for life and husband convicted of felony.

By the 4th & 5th Will. IV. c. 29, intituled "An Act for facilitating the loan of money upon landed estates in Ireland," the 1st section enables any person or persons who, under or by virtue of any direction, trust, or power, already given, created, or reserved, hereafter to be given, created, or reserved as aforesaid, is, or are, or shall be, authorized or directed to lend money at interest on real securities in England, Wales, or Great Britain, to lend the same or any part thereof at interest on real securities in Ireland, in the same manner in all respects, as if such investment had been expressly authorized in, or by such direction, trust, or power as aforesaid.

The 2nd section provides, that "All loans of money on real securities in Ireland under this Act, in which any minor or unborn child, or person of unsound mind is or may be interested, shall be made by the direction and under the authority of the Court of Chancery or Exchequer in England, such direction or authority being obtained in any cause upon petition in a summary way."

Summary jurisdiction in Court of Chancery.

There seems to be an accidental omission in the concluding words of the last section; but the V. C. of England has decided that they ought to be read as follows:—"in any cause or upon petition in a summary way" (h).

The order made upon a petition of this kind, usually directs a reference to the Master: first, whether it will be for the benefit of all parties interested that the fund in question should be invested

Practice under the Act.

(t) 11 Sim. 352; and 13 Sim. 260. (h) Ex parte French, 7 Sim. 510.  
(u) 1 Ph. 258.



Municipal  
Corporations  
Act.

ed on real security in Ireland; and, if the Master shall so find, then whether the proposed securities are sufficient, regard being had to the annual value of the property comprised in such securities, and to the nature of the tenure thereof, and whether a good title can be made to the same.

Lord Lyndhurst has said, with reference to the construction of this Act, that "England and Wales must, for this purpose, be taken to include Ireland, and it is not to be assumed that the parties in remainder are not interested as well as the tenant for life in investing the money upon a security which will yield a higher rate of interest; for if it remains there long enough, they will have the benefit of it" (i).

5 & 6 Will.  
IV. c. 76.  
When corpo-  
rate body were  
charitable  
trustees.

The 71st section of the Municipal Corporations Act provides for the case where corporate bodies were before the Act trustees of property for charitable purposes. It directs to the effect that the persons, who at the time of the passing of the Act were such trustees, should, notwithstanding they ceased to hold any office, continue to be such trustees until the 1st of August, 1836, or until Parliament should otherwise order, and should immediately thereupon cease so to be. There is then a proviso, that "If any vacancy should be occasioned among the charitable trustees for any borough before the said 1st day of August, it should be lawful for the Lord High Chancellor, or Lords Commissioners of the Great Seal for the time being, in a summary way, to appoint another trustee to supply such vacancy, and every person so appointed a trustee as last aforesaid, shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee." There is a second proviso, "That if Parliament shall not otherwise direct, on or before the said 1st day of August, 1836, the Lord High Chancellor, or Lords Commissioners of the Great Seal, shall make such orders as he or they shall see fit for the administration, subject to such charitable uses or trusts as aforesaid of such trust estates."

What consti-  
tutes charita-  
ble property  
within the Act.

As Parliament has not otherwise directed, the powers conferred by this proviso upon the Lord Chancellor still continue. The jurisdiction has been exercised upon petition in a summary manner. In the case of the Oxford Charities, the question came before Lord Cottenham as to the construction of the section. A sum of money had been given to the corporation of Oxford in terms which

(i) *Ex parte* Lord William Pawlett, 1 Ph. 570; *Stuart v. Stuart*, 3 Bear. 430.

gave them a right to dispose of it as they pleased, and they had thought proper to appropriate it to the endowment of four lectureships, and to apply the income to the payment of four lecturers. The question was, whether that constituted a charitable trust within the meaning of the section. Lord Cottenham decided that it did not do so, upon the grounds that if it were a charitable trust at all, it was so exclusively for the corporation,—that if it were not a charitable trust for purposes *dehors* the corporation, it was not within the meaning of the section (*u*). Another petition under this Act came before Lord Cottenham in the matter of the Ludlow Charities. The only question then decided appears to be the propriety of the trustees appointed by the Master (*x*).

Infant Custody Act.

By the 2nd & 3rd Vict. c. 54, intituled “An Act to amend the law relating to the custody of infants,” the Court of Chancery is enabled, upon the petition of the mother of any infant, to make order for the access of the petitioner to her infant children, at such times and under such regulations as the Court shall deem convenient and just; and if such children shall be within the age of seven years, the Court may order them to be delivered into the custody of the petitioner until such age. Applications under this Act may be made either to the Master of the Rolls, or to any of the Vice-Chancellors (*b*).

Infant Custody Act.  
Power to order liberty of access to the mother.

Upon the hearing of the petition, affidavits on either side are admissible (*c*). Orders made under the Act, may be enforced by the usual process of contempt (*d*). A mother who has been guilty of adultery cannot apply (*e*).

The first reported case (*f*) under the Act, establishes that the mother has no strict right to obtain an order under the Act, but that the Court will exercise its discretion upon all the circumstances of the case, and thereupon determine both whether any access shall be given, and if so, under what regulations. The Act does not enable the mother to resist the application of her husband for the custody of his children, to which, by law, he is entitled, even though upon her application the Court may be bound to order them to be delivered back to her (*g*).

The Court exercises discretion on the subject.

By the 3rd & 4th Vict. c. 5, intituled “An Act to enable the owners of settled estates to defray the expenses of draining the

Drainage Acts.

(*u*) 3 My. & Cr. 239.

(*x*) 3 My. & Cr. 262.

(*b*) In re Taylor, 10 Sim. 291.

(*c*) Sec. 2.

(*d*) Sec. 3.

(*e*) Sec. 4.

(*f*) In re Taylor, 11 Sim. 170.

(*g*) Costellis v. Costellis, Dr. & W. 235.

Act for perpetuating  
Testimony.

same by way of mortgage," power was given to the Court of Chancery upon the application of the owners of settled estates to make orders charging sums expended in draining such estates upon the lands so drained. The cases of *Stanhope v. Stanhope* (h) and *ex parte Deering* (i) exhibit the practice under this Act. The costs of applications under it having been found so great as to diminish its utility, it was repealed, and its provisions, with certain modifications, extensions, and alterations re-enacted by 8 & 9 Vict. c. 56. As it seems probable that another statute upon the same subject will be passed during the present session of Parliament, it is not necessary further to detail the provisions of this Act now in operation (k).

Lastly, the 5 & 6 Vict. c. 69, intituled "An Act for perpetuating testimony in certain cases," enables "Any person, who would under the circumstances alleged by him to exist, become entitled upon the happening of any future event, to any honor, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event," — to file a bill to perpetuate any testimony which may be material for establishing such claim or right.

This Act does not, however, introduce any new system of procedure, as it provides, that "All laws, rules, and regulations not contrary to the provisions of the Act, now in force or in use in suits to perpetuate testimony, or respecting depositions taken in such suits, or the punishment of perjury committed in making such depositions, shall be in force and used and applied in all suits to be instituted under the authority of this Act, and in respect to depositions taken in such suits."

Attorney general to be a party.

The second section enacts to the effect that the Attorney-general shall be a party defendant in all suits under the Act in which the Queen has any interest.

(h) 3 Beav. 547.

(i) 12 Sim. 400.

(k) A series of Orders, for the purpose of carrying out the provisions of

this Act, issued on the 4th of March, 1846, and will be found in the 10th volume of the *Jurist*, page 84.

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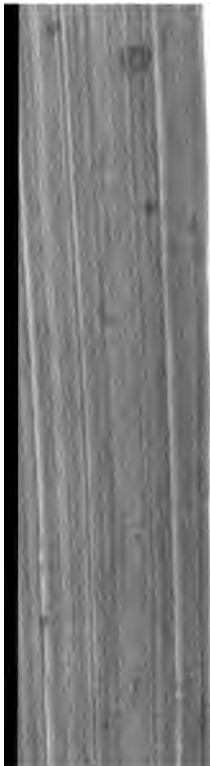
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